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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
KING'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY JR276 (A PATIENT)
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF
THE MUCKAMORE ABBEY HOSPITAL INQUIRY
AND THE BELFAST HEALTH AND SOCIAL CARE TRUST

Ronan Lavery KC and Colm Fegan (instructed by McIvor Farrell, Solicitors) for the applicant, 'JR276'
Donal Sayers KC and Denise Kiley (instructed by the Solicitor to the Inquiry) for the first respondent, the Muckamore Abbey Hospital Inquiry
Joseph Aiken KC and Laura King (instructed by the BSO Directorate of Legal Services) for the second respondent, the Belfast Health and Social Care Trust
Brenda Campbell KC and Sean Mullan (instructed by Phoenix Law) for 'NP1'
Monye Anyadike-Danes KC and Aidan McGowan (instructed by Phoenix Law) for 'NP2'
Conor Maguire KC and Victoria Ross (instructed by O'Reilly Stewart, Solicitors) for 'NP3'

SCOFFIELD J

Introduction

[1] The applicant, who is known in these proceedings as 'JR276' in order to preserve his anonymity, is a patient of Muckamore Abbey Hospital ("Muckamore") and acts by his mother as next friend. By these proceedings he seeks to challenge the process by which the Muckamore Abbey Hospital Inquiry (MAHI) ("the Inquiry") has requested and proposes to obtain medical notes and records relating to him, which would otherwise be confidential, for the purposes of its work. The applicant also challenges the approach of the Belfast Health and Social Care Trust ("the Trust") in respect of this matter; although it is fair to say that the primary target of the challenge is the Inquiry.

[2] There are three notice parties who have been given permission to participate in these proceedings – known respectively as 'NP1', 'NP2' and 'NP3' – who are Muckamore patients or former patients, or relatives of such patients, and also core participants in the Inquiry. They too have been granted anonymity in light of the

relevant patient's lack of capacity and some of the details in relation to their medical conditions and care which are contained in the evidence. The notice parties essentially support the applicant's challenge. NP1 is within Core Group 2 of the core participants before the Inquiry, which is affiliated to an organisation called the Society of Parents and Friends of Muckamore (SPFM). He was an in-patient in Muckamore for some 35 years, until very recently. He lacks capacity and acts by his sister and next friend. NP2 is within Core Group 1 of the core participants, affiliated to an organisation called Action for Muckamore (AFM). He lacks capacity and acts by his father and next friend, who I have been told was instrumental in pressing for the Inquiry to be set up. NP3 is within Core Group 3, who are core participants not affiliated to either Group 1 or Group 2. She is the mother of a former patient detained in Muckamore, who has now sadly passed away.

[3] The applicant's representatives have described the primary question to be determined in these proceedings as whether it is lawful for the applicant's medical notes and records to be requested by the Inquiry, and in turn be provided to it by the Trust, without the applicant's knowledge, consent or involvement at any stage of that process.

[4] Mr Lavery KC appeared with Mr Fegan for the applicant; Mr Sayers KC appeared with Ms Kiley for the Inquiry; Mr Aiken KC appeared with Ms King for the Trust; Ms Campbell KC appeared with Mr Mullan for NP1; Ms Anyadike-Danes KC appeared with Mr McGowan for NP2; and Mr Maguire KC appeared with Ms Ross for NP3. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[5] The issues raised by these proceedings are largely questions of law. Nonetheless, it will be helpful to set out a brief summary of the factual context which has given rise to the present dispute. The applicant is now 31 years old. He has been an in-patient within the Six Mile Ward at Muckamore for over a decade. That ward is a secure unit which provides care and treatment to male patients with a learning disability who have mental health difficulties and who have had previous contact with forensic services. For his part, the applicant has diagnoses of Severe Learning Disability, Epilepsy, Autism and ADHD; and is described as having Emotionally Unstable Personality Disorder. His conditions have given rise to a severe impairment of his intelligence and to complex behavioural needs. The applicant's mother has 'core participant' status in the Inquiry. She provided a written witness statement to the Inquiry in October 2022 and gave oral evidence to it shortly afterwards about the applicant's experience and treatment in Muckamore. The applicant's father (the ex-husband of his mother and next friend) also has core participant status and made a statement to the Inquiry in September 2022. He also gave oral evidence shortly afterwards.

[6] The Inquiry is a statutory inquiry established under the Inquiries Act 2005 ("the 2005 Act"). Its Terms of Reference indicate that its core objectives include

examining the abuse of patients at Muckamore and determining why the abuse happened and the range of circumstances which allowed it to happen.

[7] An important feature of the context of this challenge is a decision given by the Chair of the Inquiry, Mr Tom Kark KC, which was published on 5 June 2023. It was entitled, 'Determination Relating to Section 21 and Section 22 Inquiries Act 2005 With Reference to the Patient Document Requests Made to the BHSCT' ("the Chair's PDR Ruling"). The written ruling arose out of concerns expressed by the Trust about the legality of its complying with notices issued to it by the Inquiry requiring the production of patients' notes and records. Such notices have come to be referred to as patient document requests (PDRs). They were issued by the Inquiry pursuant to section 21 of the 2005 Act and rule 9 of the Inquiry Rules 2006 ("the 2006 Rules").

[8] The notices in question required the Trust to provide specific patients' medical notes and records to the Inquiry. The Inquiry's practice has been to make what it calls "targeted requests" for such records, that is to say by seeking limited parts of those records which appear to it to be relevant to its work rather than seeking provision of the entirety of the patient's notes and records. The PDRs are not requests to produce all documents held by the Trust relating to a patient. Rather, some of the requests are for all documents held by the Trust relating to a patient with reference to a specified period of time; and others are for specified documents only. By this means, the Inquiry has sought to avoid being swamped by the provision of unnecessary records and aims to delegate (although that word is not entirely apposite) the sifting of those records, at least in the first instance, to the providing body which is the record-holder and recipient of the notice. As mentioned further below, the Inquiry has been keen to emphasise that, in proceeding in this way, it intends to take an incremental or iterative approach. Where it judges it necessary or appropriate, it will in due course seek further patient records relevant to its work.

[9] It seems that the Trust had previously provided excerpts of patients' medical notes and records to the Inquiry in this way. However, at some point the Trust became concerned about whether it was appropriate for it to do so. This concern turned upon whether such records may be immune from compelled disclosure by virtue of section 22(1)(a) of the 2005 Act. The position adopted by the Trust at this point was to invite the Inquiry to make an application to the High Court in order to provide a sound legal basis for the provision of such records to the Inquiry. The Chair of the Inquiry ruled on these issues in his PDR Ruling referred to above. It is unnecessary for present purposes to set out in detail the arguments made or the full reasoning of the Chair for rejecting them. The core of the Chair's reasoning, however, was as follows:

(i) That there was no bar to the provision of such records which arose under section 22(1)(a) of the 2005 Act because the High Court *could* make an order in civil proceedings requiring the disclosure of such information. The relevant test was whether the High Court could make such an order (because it was couched in terms of whether the recipient "could not be required" to produce

the document), rather than whether the High Court *would* or *should* order the documents to be disclosed.

(ii) That the *O'Hara* case discussed below was of little or no assistance, largely because the statutory basis of the relevant power was couched in different terms in each case. In the present case, the test in section 21(1)(a) of the 2005 Act is as mentioned above; whereas in the *O'Hara* case the test (set out in para 4(3) of Schedule A1 to the Interpretation Act (Northern Ireland) 1954 ("the Interpretation Act")) was whether the recipient of the notice "*would* be entitled, on the ground of privilege *or otherwise*, to refuse to produce" the document. In the Chair's view, the different wording in the 2005 Act was designed to give an inquiry chair discretion to the full extent of what the High Court could permissibly order to be disclosed.

(iii) That the requirement to provide the patient records was justified and not in violation of article 8 rights.

[10] The Chair therefore indicated that, unless the Trust complied with the section 21 notice, he would refer the matter to the High Court for enforcement pursuant to his power under section 35 of the 2005 Act. The Inquiry has since indicated that it will not seek to enforce the PDR notices in that way pending the determination of these proceedings. For its part, the Trust has participated in these proceedings – and has adopted the position described below – but has not itself sought to challenge the Chair's ruling of 5 June 2023. However, the publication of the Chair's PDR Ruling put the applicant's mother (and others) on notice, at least to some degree, of how the disclosure of patient records was being dealt with and piqued their concern. Pre-Action Protocol correspondence then followed. At that point in time, the applicant and his mother did not know whether the Inquiry had already requested and obtained his medical notes and records from the Trust or not.

[11] Following an exchange of correspondence, it became clear that the Inquiry had in fact issued a notice to the Trust (on 2 March 2023) requiring provision of some of the applicant's notes and records. The applicant's next friend avers that she only became aware of this in mid-June 2023 when the Trust so informed her in its response to pre-action correspondence which had been directed to it. At the time of the commencement of these proceedings, the applicant had not been provided with sight of the PDR relating to his records, as the Inquiry would not permit its release to him. (This document has since been shared with the court and the applicant in the course of these proceedings in order to assist the court's understanding of how the Inquiry has proceeded.)

[12] The applicant contends, rightly as it seems to me, that, had this challenge not been brought, it is likely that the Inquiry would have obtained certain of his medical notes and records without his (or his next of kin) having known that his records were so obtained. The question for the court is whether this would have given rise to any unlawfulness in public law terms.

[13] The wider context to this application relates to the way in which the Inquiry is proceeding more generally. It began hearing evidence from patients or former patients of Muckamore, or their family members, in what was described as the 'patient experience' phase of its hearings. It was intended to use these hearings as one means of identifying issues, concerns and themes which warranted further investigation. Some patients or former patients (or their family members) wished to see the medical notes and records held by the Trust in respect of them in advance of making a statement to the Inquiry or giving evidence. The Inquiry has not adopted this approach, determining instead that it was appropriate to hear patients' stories based on their or their loved ones' recollections and experiences. Armed with knowledge collected from this earlier phase, the Inquiry then intended to make targeted requests for patient material. After such hearings were held between June 2022 and November 2022, the Inquiry made requests for specified documents relating to 19 particular patients. It is this development which prompted the exchanges giving rise to these proceedings.

[14] The Trust has referred to the Inquiry's methodology in this regard as a "potentially circular approach" in its submissions; and the Inquiry's approach has been the subject of some criticism in some of the evidence provided by notice parties. Nevertheless, the Inquiry has made clear from the time of its opening statements that this was the way in which it had decided to proceed; and that it would seek medical reports in a targeted and incremental way as it went along and as its knowledge and evidence-base grew.

Summary of the parties' positions

[15] The applicant's mother has been at pains in her affidavit evidence to make the point that she wishes to help the Inquiry achieve its purpose and that she does not wish to be obstructive. She says that she is "not completely opposed in principle" to the Inquiry having access to the applicant's medical notes and records. Her concern is about her having no knowledge of, or input into, that process. She wishes to be notified of the request for her son's records, to therefore be aware of the exact nature and scope of the request and the purpose for which it is made, and to then have an opportunity to be heard if she has an issue with, or concerns about, the request. She accepts that, if she was involved with the process of obtaining her son's records in this way, she might well take no issue with the extent or nature of the Inquiry's PDR. However, she argues for participation rights which would allow her to contend either that the Inquiry's request for her son's notes and records was too wide (covering highly sensitive and private information which ought not to be disclosed) or too narrow (so that, with the benefit of her knowledge, she could argue that there are other, additional records which it would be important for the Inquiry to obtain and consider).

[16] The applicant therefore challenges the Inquiry's 'exclusion' of him from the PDR process on two essential bases. First, he contends that this is in breach of the

Chair's statutory obligation of fairness and/or in breach of a common law duty of fairness towards him. Second, he contends that it is in breach of his right to respect for his private life under article 8 ECHR in both its procedural and substantive dimensions. Grounds which were added to the applicant's Order 53 statement after the commencement of these proceedings (but before the grant of leave, given that the matter has been dealt with by way of rolled-up hearing, so that leave to amend was not required) – based on breach of the UK General Data Protection Regulation and Data Protection Act 2018 (DPA) – were not pursued in oral argument. I mention these issues further, briefly, below.

[17] The Inquiry first contends that this application has not been brought within the strict time limit set out in section 38 of the 2005 Act and should be dismissed on that basis. In the alternative, it submits that leave to apply for judicial review should be refused, or the substantive application dismissed, on the basis that the applicant's grounds of challenge lack merit. It submits that the participation rights contended for by the applicant are alien to, and contrary to the scheme of, the 2005 Act; and that, in all of the circumstances, procedural fairness (in whatever context it arises) does not require such participatory rights to be read into the scheme by the court. The Inquiry contends that this is clear from the context, including both the nature of its powers and functions and the further rights and protections of which the relevant patient or their representative can avail. As to whether its receipt of the relevant records is justified under article 8, the Inquiry contends that this is plainly justified given the nature of the Inquiry's task and the general approach of the applicant and notice parties, namely that they accept that it is appropriate in principle for the Inquiry to seek relevant medical records. Indeed, in many if not all instances, they would be keen for the Inquiry to seek and obtain *more* records.

[18] NP1, NP2 and NP3 support the applicant's case and would seek similar participation rights for themselves at the time of notes and records relating to them or their relative being sought and obtained. It seems that this is primarily to seek to assist with the Inquiry's work by directing it to additional relevant material within the notes and records which they contend should be obtained. AFM, with which NP2 is associated, wanted the Inquiry to obtain the full medical notes and records and disclose them to patients and their families before they were required to make their statements or give evidence. It remains concerned about the current approach of the Inquiry on the basis of the risk of the Inquiry not requesting or considering relevant extracts from records, so that instances of abuse will be missed, or trends go unnoticed. It has also lost confidence in both the good faith and competence of the Trust, such that it wishes to leave the Trust no room for discretion or interpretation regarding compliance with the Inquiry's requests.

[19] Drawing on the Supreme Court's discussion of procedural fairness in the *Osborn* case ([2014] AC 1115), NP2 submitted that his involvement would lead to better decision-making on the part of the Inquiry as to what records should be sought and would avoid the sense of injustice which he feels at being shut out from this process. All of the notice parties' submissions drew attention to the feeling of

injustice and exclusion which they contend arises from the Inquiry's approach; and to the concern that the Inquiry was depriving itself of the benefit of their informed assistance in these important steps in its evidence-gathering process. (For instance, the evidence is that a member of NP1's family has been to visit him every day since his admission to Muckamore, save for the period when visits were stopped due to the Covid-19 pandemic, such that they would have detailed knowledge of issues that should be explored.)

[20] For its part the Trust has emphasised that it supports the work of the Inquiry. However, it says that it "has struggled to see how it can lawfully provide patient material (affecting individuals to whom it owes a duty of confidentiality (and in the absence of their consent)) to a public inquiry without those persons having any notice of that fact, or any opportunity for them to have involvement in that process." It was for this reason that the Trust suggested that the Inquiry should seek a court order, since that would have secured the involvement of the patients concerned or at least the opportunity for them to become involved. However, if that is not required, the Trust supports the applicant's and notice parties' case that, when a section 21 notice is issued requiring production of such material, the patient must still be given an opportunity by the public inquiry to know of that fact and to be heard about it. The basis of this approach is the importance attaching to the obligation of confidence owed by the Trust to patients and the need for a balancing exercise to determine whether that confidence is overridden by the public interest in disclosure.

Relevant statutory provisions

[21] Most if not all of the statutory provisions relevant for present purposes are to be found in the 2005 Act. Section 17 of that Act provides, insofar as material, as follows:

> "(1) Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.
>
> …
>
> (3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)."

[22] Section 21(1) confers power on the Chair by notice to require a person to attend (at a time and place stated in the notice) to give evidence, produce documents and/or produce physical evidence. Section 21(2)(b) is particularly relevant in the present case. It provides as follows:

> "The chairman may by notice require a person, within such period as appears to the inquiry panel to be reasonable—
>
> …
>
> (b) to provide any documents in his custody or under his control that relate to a matter in question at the inquiry; …"

[23] A notice under section 21(1) or (2) must explain the possible consequences of not complying with it and indicate what the recipient of the notice should do if he wishes to make a claim to have the notice revoked or varied: see section 21(3). Section 21(4) permits a recipient of a section 21 notice to make a claim either (a) that he is unable to comply with the notice or (b) that it is not reasonable in all the circumstances to require him to comply with it. Any such claim is to be determined by the chairman of the inquiry, who may revoke or vary the notice on that ground, or not: see section 21(4). In deciding whether to revoke or vary a notice on the latter ground, namely that it is not reasonable to require the recipient to comply with it, the chairman must consider the public interest in the information in question being obtained by the inquiry, having regard to the likely importance of the information: see section 21(5).

[24] Section 22 of the 2005 Act, headed 'Privileged information etc', makes further provision related to the power of a public inquiry to require the production of evidence under section 21. Section 22(1) provides as follows:

> "A person may not under section 21 be required to give, produce or provide any evidence or document if—
>
> (a) he could not be required to do so if the proceedings of the inquiry were civil proceedings in a court in the relevant part of the United Kingdom, or
>
> (b) the requirement would be incompatible with a retained EU obligation."

[25] By virtue of section 22(2), the rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an inquiry as they apply in relation to civil proceedings in a court in the relevant part of the United Kingdom.

The delay issue

[26] Section 38(1) of the 2005 Act imposes an abbreviated time-limit for applying for judicial review of a decision made by the relevant Minister in relation to a public inquiry or by a member of an inquiry panel. Any such application "must be brought within 14 days after the day on which the applicant became aware of the decision, unless that time is extended by the court." The remaining provisions of section 38 are not relevant for present purposes. Unlike the position under RCJ Order 53, rule 4, under section 38 time begins to run only from the date of awareness of the impugned decision.

[27] Key questions for the court therefore, in applying this time limit, are (i) what the decision is which is under challenge; and (ii) when the applicant became aware of this. Mr Sayers for the Inquiry was able to gain some forensic advantage from the way in which the applicant's case has been pleaded. At least in part, it is said to be directed to "the Respondents' processes and procedures in relation to requests for, and disclosure of [the Applicant]'s confidential patient notes and records." The general reference to a challenge to the Inquiry's "processes and procedures" has allowed the first respondent to paint the proceedings as relating to its general way of proceeding in relation to patient notes and records, which was known about, at least in principle, quite some time ago.

[28] At the opening of the Inquiry, and on a number of occasions since, the Chair publicly confirmed that it would be making targeted requests for documentation relating to patients, as opposed to global requests for patient records. The Inquiry relies particularly upon a further public statement issued by the Chair on 13 February 2023, at which stage (it submits) it was clear that the previously outlined intended approach was in fact being implemented. The Chair said:

> "It is worth noting that, in keeping with the approach of the Inquiry to the obtaining of documents relating to individual patients, the Panel has analysed all of the evidence received to date and has identified the documents relating to those patients that it needs to obtain to assist in addressing the terms of reference. The formal requests for those documents will issue to the Trust shortly."

[29] As the applicant's mother, who acts as his next friend in this challenge, is a core participant in the Inquiry and is legally represented in the inquiry proceedings, she can be taken to be aware of the content of these statements. The request for documents in the applicant's case was made by the Inquiry to the Belfast Trust on 2 March 2023. In a further public statement issued on 20 March 2023, the Inquiry says that the Chair confirmed that the requests for documents had then been made:

> "… the substantial body of evidence that we heard last year has allowed the Panel to identify several themes of inquiry which we wish to explore in greater detail and, as a result, we have made a number of requests for documentation from the Trust relating to those themes based on the evidence we have heard."

[30] On this basis, the first respondent contends that the applicant knew, by 20 March 2023 at the latest, that a PDR had been issued in his case; and that he was aware, a long time prior to that, of how the Inquiry intended to deal with the obtaining of patient records. However, I accept the applicant's submission that these statements were not sufficiently clear for him to be aware of the precise issue of which he makes complaint in these proceedings. In particular, he would not necessarily have been aware at that point that a PDR had been made in respect of *his* notes and records. The Inquiry said merely that "a number of requests for documentation" had been made. That might not have included a request for notes and records in the applicant's case. (I understand that some 45 witnesses had given evidence at the end of Phase 1 of the Inquiry's hearings but that only 19 PDRs were issued.) Moreover, the mere fact that a request for some the applicant's records had been made at that point would not necessarily have alerted him to the key issue of concern which he now raises, namely that, in advance of the requested documents being provided, he would be provided with no opportunity to participate in a debate about what documents should be disclosed. As it seems to me, that key fact was not made clear by the Inquiry's statements, although it might possibly have been inferred. The applicant's mother has averred that, when pre-action correspondence was sent on her behalf on 12 June 2023, she did not know whether the applicant's records had been requested; and that she only became aware of this on 14 June 2023.

[31] These proceedings were commenced on 19 June 2023. To some degree, the applicant relied upon the Chair's PDR Ruling of 5 June as the catalyst for these proceedings. There is a certain degree of artificiality about that as all that the Chair's ruling determined was (a) that the Inquiry did not propose to seek a court order in order to authorise the Trust to hand over notes and records; and (b) that the Inquiry Chair rejected the Trust's section 22(1)(a) point. It might be said that, in light of the content of the ruling, there was a much stronger inference that the Inquiry intended to require production of medical records and enforce that requirement without having any recourse to the patient to whom those records related, although again this was not expressly stated.

[32] In summary, I conclude that the core target of this challenge is the issuing of PDRs in relation to medical records without putting the relevant patient (or their relative) on notice of the PDR either at the time of its issue or in advance of receipt of the documents. I also conclude that the applicant was not aware that that was in fact the approach being taken in his case until so informed by the Trust in its correspondence of 14 June 2023. Viewed in that way, the proceedings were brought within time.

[33] Even if I am wrong in this, in the present case I would have been inclined to grant an extension of time to permit this case to proceed. The applicant could have sought relief against the Trust – as indeed he has – at any time in advance of the Trust providing the Inquiry with the requested records. Any such challenge to the legality of the Trust's actions would inevitably have had to deal with some or all of the claims made in these proceedings. In addition, this issue is likely to arise again in the course of the Inquiry's work; and it is likely to be a running sore if it is not determined by the courts.

Are participation rights required in the section 21 process?

[34] I turn then to the key issue in the case: as a matter of fairness should the applicant have been provided with the rights he seeks, namely (i) advance notice of the PDR, including the exact nature, scope and purpose of it; and (ii) an opportunity to be heard in relation to it, with time and legal advice afforded for this purpose, as necessary, before it was served or at least before it was complied with?

[35] With one qualification (addressed further below), it was common case that a different result was unlikely to be reached depending upon the nature of the obligation at play: whether the obligation of procedural fairness at common law, the statutory obligation to act with fairness in making procedural decisions under section 17(3) of the 2005 Act, or the procedural aspect of article 8 ECHR. In short, the question is whether the process adopted by the Inquiry is fair for each of these purposes. At common law, it is well established that the scope of the duty of fairness, and what it will require in any particular circumstance, is context-specific (see *Lloyd v McMahon* [1987] AC 625, at 702H). As Lord Bridge said, "… what the requirements of fairness demand… depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates."

[36] The starting point for consideration of this question is the 2005 Act. The context of the request for records is important. That context is set by the terms of the 2005 Act under which the Inquiry is established and which sets out its powers. In turn, a further important point to recognise at the commencement of the discussion is that there is nothing in section 21 of the 2005 Act which supports the proposition that the recipient of a section 21 notice, or (more importantly in the context of the present case) a third party likely to be affected by compliance with such notice, enjoys any right to make representations to the inquiry panel in advance of the exercise of its evidence-gathering powers by way of serving a section 21 notice. Limited procedural rights are provided to the recipient of such a notice under section 22(4); but these are to be exercised after service of the notice and are not conferred upon a third party whose information may be held by the recipient of the notice.

[37] I accept the Inquiry's submission that the power conferred on the chairman of a public inquiry by section 21 of the 2005 Act is designed to be exercised in a manner

which renders the production of evidence relevant to the Inquiry's work both swift and effective. It is a wide-ranging and uncomplicated power. Parliament could have qualified this power in a variety of respects, including by means of the provision of procedural rights to a range of third parties, but it did not do so. The scheme of the legislation provides a generous discretion to the chairman of a public inquiry, both as to process and to the substance of its investigations, and necessarily also reposes a considerable degree of trust in such a chairman in the exercise of the inquiry's powers. That is evident on the face of the statute, which provides (in section 17(1)) that, subject to the Act and rules made under it, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.

[38] The mere fact that the type of participation sought by the applicant has not been expressly provided for in the terms of the 2005 Act is not necessarily determinative of this application for judicial review. The courts can, and will, imply into statutory schemes additional procedural safeguards where fairness so requires. However, the absence of any such rights within the statutory scheme itself is an important starting point for the analysis. It can be a powerful indication that it was Parliament's intention to exclude procedural rights which may complicate the process.

[39] The question for me in this case is whether, in all of the circumstances and in this particular context, fairness requires the participation rights for which the applicant contends. In my view, answering this question requires some consideration of the nature of public inquiries; the nature of the information being requested; the practicalities of how the documentation will be dealt with if obtained by the Inquiry in the way in which it proposes; the prejudice, if any, which will be occasioned to the applicant; and the implications of the rights for which the applicant contends. I consider each of these issues below and also discuss some of the key authorities relied upon by the parties in their submissions.

The nature of public inquiries

[40] Section 1 of the 2005 Act permits a Minister to cause an inquiry to be held where particular events have caused public concern or there is public concern that particular events have occurred. In all cases, a public inquiry will be investigating matters of public concern. This point was made by the Divisional Court in England and Wales in the case of *R (The Cabinet Office) v the Chair of the UK Covid-19 Inquiry* [2023] EWHC 1702 (Admin) ("the *Cabinet Office* case"), which is discussed in some detail below. At para [52], the court said this:

> "It is well established that regard must be had to the investigatory and inquisitorial nature of a public inquiry. An inquiry is not determining issues between parties to either civil or criminal litigation, but conducting a thorough investigation. The inquiry has to follow leads and it is not bound by the rules of evidence."

[41] The investigatory and inquisitorial nature of a public inquiry are important features of this case. Such inquiries are an extremely important means, if not the principal means, by which matters of high public concern are examined in the United Kingdom. They are expensive to set up and run and they are seldom, if ever, established lightly. It is important that they are able to investigate matters within their terms of reference speedily and effectively and that, insofar as possible consistent with the inquiry's legal obligations, obstacles are not placed in their way in obtaining evidence and following it wherever it may lead. It was the intention of Parliament, and is no doubt the expectation of the public, that an inquiry will be equipped with powers which enable it to get to the bottom of matters it has been charged with investigating. The inquisitorial nature of a public inquiry is also important. As discussed further below, it will be for such an inquiry to determine whether, how and the extent to which documents it obtains will be used and/or made public.

[42] The nature of the power contained within section 21 of the 2005 Act was recently examined in the *Cabinet Office* case referred to above. That case concerned a requirement to provide to the UK Covid-19 Inquiry a variety of WhatsApp communications, as well as notebook and diary entries, some of which the recipient of the notice (the Cabinet Office) contended were "unambiguously irrelevant" to the matters in issue before the inquiry. There were also concerns about "the security and sensitivity of information" contained in various communications which were the subject of the notice (see para [16]). A key issue in that litigation was the question of who should decide upon whether any particular message was, or might be, relevant to the work of the inquiry. The case is relevant in a number of respects but, in particular, because it is an instance of a challenge to an approach adopted by a public inquiry which was contended to be over-zealous in its pursuit of evidence relevant to its terms of reference; and because it addresses the issue of the allocation of decision-making as to what is and is not required for an inquiry to conduct its work.

[43] As to concerns that a public inquiry is seeking *too much* documentation in the exercise of its powers – which is likely to be a more common objection than one that the inquiry is obtaining too little – authority suggests that public inquiries are only to be restrained from pursuing particular lines of enquiry if the relevant court is satisfied that it is "going off on a frolic of its own." A court will be slow to reach such a conclusion and will give an inquiry significant leeway where it is bona fide seeking to establish a relevant connection between certain facts and the subject matter of the inquiry (see para [53] of the *Cabinet Office* case and the authorities mentioned therein). As an investigative body, a public inquiry is permitted and to some degree expected to engage in what might otherwise be regarded as "fishing." In the *Cabinet Office* case, the court considered that a section 21 notice was not invalidated by virtue of the fact that it may, or even would, yield disclosure of some irrelevant material (see para [65]).

[44] As I have mentioned, it is significant that the type of process which the applicant says is required is not provided for in the 2005 Act itself. Nor is it provided for in the more detailed Inquiry Rules 2006. (The First Minister and deputy First Minister in Northern Ireland do not appear to have exercised their power under section 41 of the 2005 Act to make Rules for inquiries in respect of which a Northern Ireland Minister is responsible. The Chair has, however, committed himself to applying the 2006 Rules made by the Lord Chancellor for inquires for which a United Kingdom Minister is responsible unless, exceptionally, a departure from those rules was required.)

The nature of the documents sought

[45] Much of the argument on behalf of the applicant and notice parties, and indeed the Trust, focused upon the nature of the records which were the subject of PDRs served (or to be served) upon the Trust. Medical records, it was contended, fell within a special category which had long been recognised. It is of course true that medical records are regarded as containing particularly sensitive personal information and that they attract an obligation of confidence. However, confidentiality alone has consistently been recognised as affording no defence to a legal obligation of disclosure (unlike, for instance, a claim of privilege).

[46] As Lord Wilberforce said in *Science Research Council v Nassé* [1980] AC 1028, at 1066, "There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone." The House of Lords went on to hold that there was no reason why, in the exercise of its discretion to order discovery, the court should not have regard to the fact that the documents are confidential, and that to order disclosure would involve a breach of confidence. The court should therefore inspect the documents, considering whether special measures should be adopted and following procedures which would avoid delay and unnecessary applications. See generally, Matthews and Malek, *Disclosure* (5th edition, 2017, Sweet & Maxwell) at section 8.24.

[47] An issue with which I have struggled in the course of considering this case is where, if the applicant is correct, the obligation of fairness for which he contends would end. Neither the applicant's counsel nor those of the other parties supporting his case was able to provide me with any meaningful assistance in this respect, other than suggesting that the court need only deal with the case before it and that this case (where third party *medical* records were being sought) was a clear case where fairness required third party participation rights. But if fairness requires a third party to be given notice of a section 21 requirement to produce to a public inquiry confidential information or records relating to him in this case, why not in others? It may be the case – as Mr Lavery submitted – that health records are in a special category of their own and are to be treated as unique in terms of procedural protections which should attach to their disclosure. However, it is difficult to see why, if the applicant is correct, similar protections may not be required for other special category data

specified in Article 9(1) of the GDPR; or indeed other sensitive information conveyed to or held by the recipient of a section 21 notice in confidence.

[48] If there was a more general obligation to inform Person A that their confidential information was to be required to be produced to a public inquiry by Person or Body B, in advance of that requirement being imposed or complied with, the section 21 evidence-gathering process would, in my view, become unworkable or unduly cumbersome in a way which could not have been contemplated by Parliament. First, it would be difficult to define what type of information or level of confidence would engage the obligation. Second, it would be impossible in many cases to know in advance that the information held by Person B relevant to the inquiry's request included confidential information relating to Person A and perhaps many others. Third, the process of informing all such persons may be costly and cumbersome, not to mention the further process of receiving and dealing with submissions, and perhaps counter-submissions, as to whether the requirement to produce was properly (to be) imposed. This could well delay the inquiry's work to an unacceptable degree. Fourth, such an approach may interfere with the investigative effectiveness of the inquiry, for instance by alerting those holding relevant information to lines of enquiry or documents in which the inquiry was interested at a time or in circumstances where this may increase the risk of documents being destroyed or deleted. That is before one turns to the complications which may arise where (as here) Person A lacks capacity. Would the inquiry then have to conduct its own capacity assessment in respect of the person to be informed and granted participation rights? Would a next friend have to be appointed? What if there was a dispute between various persons as to who the next friend should be or what position should be adopted? There are a host of reasons why it is unsurprising that Parliament has conferred limited procedural rights only upon the recipient of the notice and, even then, only on relatively limited grounds.

[49] I am content to proceed on the basis that it is possible that, in the present case, the protection afforded to medical records is such that it puts them in a special category, although this seems to me to be more likely under the auspices of article 8 than at common law. The mere fact that such records are held subject to an obligation of confidence, however, does not appear to me to have any particular significance as far as the statutory scheme is concerned. (In his PDR Ruling, the Inquiry Chair was obviously concerned that any requirement to apply to the court would, if the Trust's submissions were correct, extend to "every case where there was a duty of confidentiality in documents which a public inquiry wanted to see": see para 28 of that ruling.)

[50] The Inquiry has also drawn attention to the Explanatory Notes to the 2005 Act. The note relating to section 21 identified three main scenarios in which the powers of compulsion conferred by the provision were likely to be used. One of those was where a person was unwilling to comply with an informal request and was "worried about the possible consequences of disclosure (for example, if disclosure were to break confidentiality agreements)" and therefore asked the chairman to issue a

formal notice. In the Inquiry's submission, this indicates that it was envisaged that situations might arise in which issues of confidentiality arose, in response to which Parliament did not provide for a notice procedure but, rather, simply conferred power to compel production.

How will the documents be dealt with once received?

[51] The Inquiry has emphasised that it has exercised its powers to require the production of the requested documents to the inquiry panel and to it alone. It emphasises that the panel is, of necessity, an expert panel (see section 8 of the 2005 Act) and, one might add, impartial (see section 9). No issue arises at present about disclosure of any of the material to be obtained as a result of the PDR process to anyone other than the inquiry panel. There is no obligation on the Inquiry to disclose the documents once received. This is merely part of an iterative process of investigation, which might well lead to further requests in due course and/or to further engagement with the patients whose records are received. In this regard, the Inquiry relies upon a commitment given by Senior Counsel to the Inquiry in his opening statement:

> "As witnesses make their statements and give evidence, the Inquiry team will constantly monitor what records and other material the Inquiry will need to obtain in relation to the patient concerned. The Inquiry will strive to ensure that no one is disadvantaged by this approach.
>
> If records are later produced that the Inquiry thinks that the witness should be asked about or should have the opportunity to comment on, the necessary arrangements will be made for that to happen."

[52] As noted above (see para [16]), in an amended Order 53 statement served several months after the proceedings commenced, the applicant sought to bring in additional arguments grounded upon the UK GDPR and the DPA in support of his challenge to the Inquiry's PDR. Aside from contending that these new grounds were also out of time and barred by the availability of an alternative remedy in the form of a complaint to the Information Commissioner, the simple answer provided by the Inquiry to this proposed challenge – which appeared to me to have very considerable force – was that, in the absence of having been provided with the applicant's records (for the reason mentioned at para [10]), it was not presently "processing" those records for the purpose of the data protection legislation. Processing involves an operation or set of operations which is "performed *on* personal data" (see Article 4(2) of the GDPR). Having not received the documentation which it had requested, the Inquiry was and is not yet engaged in any such operations, such that a challenge on this basis was premature.

[53] However, once the Inquiry has data in its possession relating to a data subject, including sensitive data, the question of compliance with the data protection principles – including that data is processed fairly and transparently – will arise. The Inquiry's submissions to me expressly acknowledged that, when the relevant information is received, it will be held in accordance with the Inquiry's obligations under the DPA and the GDPR and in accordance with the Inquiry's own protocols and procedures which protect patient anonymity. On 10 November 2021, the Inquiry published 'Protocol No 1 – Production and Receipt of Documents.' On the same date, it also published its Privacy Notice and a separate 'Policy on the Processing of Special Category Personal Data' ("the SCPD Policy"). These outline a variety of rights enjoyed by data subjects whose information the Inquiry holds. For instance:

(i) The Privacy Notice states that, "The Inquiry keeps personal information secure and only shares it when necessary and in line with all data protection requirements." Some further detail is given about when the Inquiry may share personal information with third party data processors who provide necessary services to the Inquiry, or to core participants in line with its protocols.

(ii) The Privacy Notice also makes clear that, every three months, the Inquiry will review all documents provided to it and will delete any document that is not relevant to its Terms of Reference. There is also a commitment that information will be securely stored.

(iii) Individuals are advised of their rights as follows:

> "You are entitled to request confirmation that your personal data is being processed and information about how that data is processed. You are entitled to request a copy of that personal data, which will be provided to you (subject to some exceptions). You have the right in certain circumstances (for example, where the accuracy of the information held by the Inquiry is queried) to request that the processing of your personal data is restricted, or to object to the processing of your personal data. You have the right to request that the Inquiry correct or delete your personal data and the Inquiry will determine such requests in accordance with its statutory obligations."

(iv) The contact details of the Inquiry's Data Protection Officer are provided in the Privacy Notice as a point of contact if an individual is unhappy about the way in which the Inquiry is using their personal data.

(v) The SCPD Policy recognises that the Inquiry will be processing special category personal data but explains that this is necessary for reasons of substantial public interest and in the exercise of its statutory functions. The policy goes on to explain the Inquiry's procedures for securing compliance with the principles relating to the processing of such data and its policies as regards retention and erasure.

(vi) The SCPD Policy goes on to indicate that the Inquiry intends to secure compliance with the relevant data protection principles, including that personal data will be processed lawfully, fairly and in a transparent manner; that personal data shall be collected for specific, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; that personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed; that personal data shall be accurate and, where necessary, kept up to date; that personal data shall be kept in a form which permits identification of data subjects no longer than is necessary for the purposes for which the personal data is processed; and that personal data shall be processed in a manner that ensures appropriate security of the personal data, including protections against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

(vii) The steps adumbrated to ensure compliance with these principles include, amongst other things, that the Inquiry will only collect personal data for the purpose of fulfilling its Terms of Reference and not use such data for purposes that are incompatible with that purpose; that the Inquiry will only collect personal data which is necessary for that purpose and ensure that it processes such data only where necessary and proportionate; that it will conduct a review of all documents provided to it every three months and delete any document that is not relevant; that it will develop and apply a robust redaction process; and that it will ensure that personal data is only shared with those who are required to see it as part of the lawful process of the Inquiry.

[54] On 7 December 2021, the Chair made a restriction order under section 19 of the 2005 Act granting anonymity to any person who is a patient or former patient of Muckamore. Within the inquiry process, all patient names have been given a cipher and the only persons entitled to the key to that cipher are core participants to the inquiry, who have signed a confidentiality undertaking. A party can also apply for a restriction order. Indeed, there are presently two restriction orders which relate to the applicant. The first is the general restriction order (Restriction Order No 2: Patient Anonymity) which applies to patients or former patients, mentioned above. The second is a more specific restriction order prohibiting reporting of the evidence of the applicant's mother and father. Since the Inquiry is applying the 2006 Rules,

where an application is made for a restriction order, the relevant information is protected from that point pursuant to rule 12.

[55] It can be seen, therefore, that, once patient records are received by the Inquiry, they enjoy a high degree of protection; and the individual to whom they relate enjoys a range of rights. In the event that records have been obtained which are unnecessary, or which become unnecessary, they should not be retained. Whilst records are retained, the data subject should be entitled to know what records about them are held; and the records should be held and dealt with sensitively and securely, being disseminated within the Inquiry only insofar as necessary and with redactions applied as appropriate.

The case-law relied upon by the applicant

[56] In light of the discussion at paras [34]-[55] above, I tend towards the view that procedural fairness does not require the range of participation rights sought by the applicant at the stage where a public inquiry is seeking confidential documents (including medical records) as part of its evidence-gathering process. Such a procedure would cut against the grain of the statutory scheme and has properly been excluded by Parliament. However, there were two strands of authority relied upon by the applicant in support of his contention that the courts had previously recognised that, where a patient is at risk of having his or her medical records disclosed by a third party holder of those records in the course of legal proceedings (including an inquiry), that patient has a right to be informed of the application for disclosure and to participate in it in order to protect their rights. It is necessary to consider those strands of authority before reaching a firm view on the issue.

[57] The first strand of authority related to criminal cases in which third party disclosure was pursued in respect of the complainant. The second is a more closely analogous situation, which arose in this jurisdiction in the case of *O'Hara v Belfast Health and Social Care Trust* [2012] NIQB 75. The Inquiry argues that both of these situations are clearly distinguishable from the context of the present case.

[58] As to the criminal cases, there was a range of first instance decisions from England and Scotland which were relied upon in this regard. The starting point is probably the decision of a Divisional Court in England and Wales in *R (B) v Crown Court at Stafford* [2006] EWHC 1645 (Admin); [2007] 1 WLR 1524. In that case, a 14-year-old girl was the main prosecution witness in the trial of a defendant on a charge of sexually abusing her. She had received psychiatric treatment leading up to the trial and the defendant applied to the Crown Court for a witness summons requiring the production of her medical notes and records which he contended were relevant to her credibility. The Crown Court judge ordered disclosure of the claimant's psychiatric records. The Official Solicitor then began to act for the claimant and the judge was asked to state a case for the consideration of the High Court relating to whether, in the circumstances of the case, the claimant's article 8 rights had been violated. The judge was concerned about delay in the trial and

invited the claimant to court to discuss this. She attended without any arrangement or opportunity for her to be represented – an event which the Divisional Court strongly deprecated – and reluctantly agreed to the disclosure of her psychiatric records because she could not face the prospect of the trial being delayed. However, she brought judicial review proceedings seeking a declaration that she was entitled to service of the defendant's application for the witness summons and the right to make representations on what order should be made.

[59] The Divisional Court allowed the claim for judicial review and held that, although the existing legislation and rules did not expressly oblige the court to give notice of an application for a witness summons to a person in the claimant's position, the overriding objective of the relevant rules (that criminal cases be dealt with justly) required it. The court also held that, although article 8 contained no explicit procedural requirements, the court was to have regard to the decision-making process to determine whether it had been conducted in a manner that was fair and afforded due respect to the interests protected by article 8. In that case, procedural fairness in light of article 8 also required that the claimant should have been given notice of the application for the witness summons and given the opportunity to make representations before the disclosure order was made.

[60] The applicant relied, inter alia, on the statement in the judgment of May LJ (at para [6]) that it is a fundamental principle that a person's medical notes and records are confidential (see also para [16] of the judgment). That much is uncontroversial (see also Baroness Hale of Richmond at para [145] of *Campbell v MGN Ltd* [2004] 2 AC 457). It seems that a particularly heightened level of confidence is applied to psychiatric medical notes. The applicant also relied upon the rejection, at para [27] of the judgment, of the suggestion that it would have been sufficient for the interests of B to be represented only by the trust which was called upon to produce the records: "The confidence is hers, not theirs. Their interests are different." The trust also ought not to be saddled with the heavy burden of making inquiries of the patient to find reasons why he or she might object and of then putting those reasons before the court. The burden of protecting the claimant's privacy was not to be placed on the trust but resided with the court.

[61] At paras [23] and [25] of the judgment, May LJ said this:

> "More generally, although article 8 contains no explicit procedural requirements, the court will have regard to the decision-making process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and accords due respect to the interests protected by article 8. The process must be such as to secure that the views of those whose rights are in issue are made known and duly taken account of. What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to

> be taken, the person whose rights are in issue has been involved in the decision making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests. If they have not, there will be a failure to respect their family life and privacy and the interference resulting from the decision will not be capable of being regarded as "necessary" within the meaning of article 8…
>
> … In my judgment, procedural fairness in the light of article 8 undoubtedly required in the present case that B should have been given notice of the application for the witness summons, and given the opportunity to make representations before the order was made. Since the rules did not require this of the person applying for the summons, the requirement was on the court as a public authority, not on W, the defendant. B was not given due notice or that opportunity, so the interference with her rights was not capable of being necessary within article 8(2)…"

[62] In *M v Director of Legal Aid Casework* [2014] EWHC 1354 (Admin), a slightly different issue arose. The claimant had sought legal aid funding, which had been refused, in order to be represented at the hearing of a witness summons at Isleworth Crown Court where the Crown Prosecution Service (CPS) was seeking disclosure of her confidential counselling records. She sought judicial review of this refusal. In the course of his judgment, Coulson J addressed the general approach of the courts to applications for disclosure of medical records. He proceeded on the basis that the claimant's application for exceptional case funding had to be seen against a background where she had a clear and unequivocal entitlement to be heard on a witness summons which sought to go behind the confidentiality of her medical records (see para [17]). The CPS had notified her that they were seeking a witness summons for this purpose (see para [5]). Presumably, this was at the direction of the Crown Court judge under rule 28.5(3)(b)(i) of the Criminal Procedure Rules. (By this time, the relevant rules had been changed after the decision in the *Stafford Crown Court* case mentioned above.) The case is essentially about the grant of legal aid. However, the judge accepted that the individual whose records are the subject of an application has different rights to the organisation that retains those records (see para [34]); and that there was a civil right to confidentiality in medical records (see paras [51]-[52]). He quashed the legal aid authority's decision for error of law and remitted the matter back to it for reconsideration, although expressing no view upon whether, on the facts of the case, the high threshold for the grant of public funding was met.

[63] A similar issue arose in *F v Scottish Ministers* [2016] CSOH 27, in which a complainer in criminal proceedings made an application to the Scottish Legal Aid

Board for legal aid to enable her to be represented at a hearing before the sheriff of the petition by the accused for recovery of her medical, psychiatric and psychological records to assist with his defence. The Board refused the application on the basis that the legal aid legislation and regulations made no provision for legal aid to be granted for such proceedings. The petitioner thereafter made an application to the Scottish Ministers for exceptional funding, which was refused on the basis that the decision making in the relevant type of case enabled a complainer's views to be sufficiently taken into account and for their interests to be protected for the purposes of the Convention, without the requirement for them to participate in or be represented at the hearing.

[64] In the course of his opinion Lord Glennie considered that there was no doubt that the potential disclosure to any third party of medical records pertaining to the complainer engaged her article 8 rights. Medical records are likely to contain highly sensitive information about an individual and any disclosure to a third party requires to be justified (see para [28]). On the key issue, of whether protection of those interests required the petitioner to have the facility of appearing in person before the sheriff, Lord Glennie considered the two English cases discussed above and concluded that it was not sufficient for either the trust or the court to represent or protect the petitioner's interests without her having the option of appearing and being heard (see paras [39]-[41] and [45]). He went on to conclude that if the complainer has a right to be heard, whether initially or at some later stage, it must follow that she is entitled to legal representation (see para [46]). This raised the question of whether she was entitled to be publicly funded for such representation. The Scottish Ministers' decision was reduced (quashed) on the basis that they had erred in law as to the petitioner's right to be heard, with the judge giving a strong steer that funding for representation should be provided if that was necessary to make her right to be heard effective.

[65] The criminal cases relied upon by the applicant provide some powerful support for a number of the propositions he advances in these proceedings. Ultimately, however, I accept the Inquiry's submission that they are not determinative of the issue in this case because of the different context in which they arise. The result of such disclosure being granted in a criminal case is that the relevant records would immediately fall to be disclosed to the defendant in the proceedings. Although subject to the implied undertaking not to use documents so disclosed for any purpose other than for the purpose of the proceedings in which they were disclosed, another private individual (who is likely to be hostile to the complainant) will have access to those documents. They could be expected to use the documents in an adversarial setting with a view to seeking to undermine the credibility of the person to whom the records relate. Although the court has certain powers to regulate the proceedings, the use to be made of the disclosed documents in open court then becomes a matter for the defendant and his or her legal team.

[66] In my judgment, that situation may properly be contrasted with the disclosure of medical records solely to a public inquiry in the course of its investigative phase.

It will then be for the inquiry to assess their relevance and to determine whether, and if so how and to what extent, those documents should be disclosed to others. If disclosure is made, this can be subject to restriction orders and redaction. To my mind, the production of confidential medical records to a public inquiry in the way contemplated in the present case is more akin to the production of records, on a subpoena duces tecum in a criminal case, *to the Crown Court judge* in order for him or her to consider the documents and *then* decide whether (and if so what) disclosure should be made. The analogy with criminal cases is even less apt when one has regard to the fact that the particular public inquiry with which these proceedings are concerned was set up, in large part, to protect and promote the interests of the patients whose records are being sought.

[67] Some support for the distinction drawn above can, I believe, be found in the authorities upon which the applicant relies. For instance:

(a) In the *Stafford Crown Court* case, May LJ expressed surprise that the relevant rules did not require the application for a witness summons against the trust to be served on the person whose confidence would be broken by production of the records, "not least in the present case their production to a defendant who was alleged to have abused B sexually" (see para [6]). May LJ described the Crown Court in that case as "being invited to trample on B's rights of privacy and confidentiality", in circumstances where she was both a witness and a victim of the then alleged crime (see para [22]). He expressly confined his decision to the facts of that case, rather than as setting out a more general principle (see para [35]).

(b) In addition, in the *Director of Legal Aid Casework* case, Coulson J emphasised that documents were only disclosable on foot of a summons in criminal cases if they were material evidence in the case and it was in the interests of justice for them to be disclosed (see paras [12] and [37]; and see also para [29] of the *Scottish Ministers* case). What was at issue in those cases was the disclosure of documents to the defendant in the expectation that they would be deployed, where arguments about admissibility would be to the fore. The evidence-gathering phase of a public inquiry is a process of an entirely different order, where an inquiry is entitled to gather in documents on the ground merely of (potential) relevance.

(c) Moreover, in the *Scottish Ministers* case, Lord Glennie recognised that it may not be necessary for the individual whose records were at issue to have the opportunity to appear and make representations when those documents were initially to be provided to the court. It may be sufficient that the individual is able to participate at some later stage in the process (see para [45]), perhaps before the documents are handed over to some other party or perhaps only when the court has decided they are relevant, because "there may be many stages at which that person may be heard." The process as a whole must be considered.

[68] At its simplest, the analogy with the Crown Court cases breaks down because the chairman of a public inquiry is not, in my view, to be equated with a defendant seeking disclosure of medical records to aid his defence. Nor are the interests in issue equivalent. In the criminal cases, the balance is between the patient's right of confidentiality and the defendant's right (in pursuit of a fair trial) to have his defence informed of the content of the medical records (see para [20] of the *Stafford Crown Court* case). In the present context, the patient's interest remains essentially the same but the interests on the other side include a much broader public interest, including the protection of health and maintenance of public confidence in the health system, as well as protection of the patients' own rights to have potential abuse perpetrated against them investigated.

[69] Returning to May LJ's analysis in para [23] of the *Stafford Crown Court* case (see para [61] above), what has to be determined is whether, *having regard to the particular circumstances of the case* and the nature of the decisions to be taken, the person whose rights are in issue has been involved in the decision making process, *seen as a whole*, to a degree *sufficient* to provide them with the *requisite* protection of their interests. In the present case, the applicant does not require the same type of protection as he would if he were a complainant in a criminal case and his records were being disclosed to a hostile defendant. The nature and purpose of the request for documents is materially different; as is the nature of the body seeking them; and its likely treatment of those records once it has received them.

[70] It is perhaps also worth noting that, at the time of the *Stafford Crown Court* case (in July 2006), the relevant rules committee was consulting upon a draft rule to ensure that those whose medical records were the subject of a disclosure application in Crown Court cases were put on notice. In the event, the amended rule (set out at para [16] of the decision in the *Director of Legal Casework* case) permits the court to direct that the application is served on a person to whom the proposed evidence relates. The matter is therefore left to the discretion of the court. It does not follow as a matter of course.

The O'Hara case

[71] The applicant also relied on *Re O'Hara's Application* [2012] NIQB 75; [2013] NIJB 327, which arose in a factual context bearing much greater similarity to the present case. There, the Chairman of the Hyponatraemia Inquiry (Mr John O'Hara QC, as he then was) had served on the Belfast Trust a notice to produce documents which included medical records relating to a number of patients. The request arose in relation to the investigation of the death of a young girl, X. However, the records requested related to other patients because they were considered relevant to the actions and whereabouts of a doctor who had been treating X but who had also, at the same time, been responsible for other patients. During the course of an inquiry hearing, the trust indicated that it would not provide the inquiry even with a redacted copy of the medical notes and records without first notifying the patients

concerned and, in the event of not being able to obtain their consent, without obtaining a court order declaring that disclosure of their records would not be in breach of their article 8 rights. In response, the chairman issued the notice to produce; but also indicated that he would make the application to the High Court for a declaration that it was lawful for the records to be provided.

[72] The approach of the chairman (described in paras [10]-[11] of Gillen J's judgment) was such that the issue which arises in this case did not fall for consideration. He was content to seek a court order without pressing the point that the trust was required to respond to his notice to produce without such an order. (It is unclear whether that view was taken because of the precise nature of the powers available to that inquiry under the Interpretation Act (see para [9] above) or for some other reason.) In any event, the application to the court appears to have been a collaborative effort between the inquiry and the trust in order to provide the latter with unassailable legal authority for the disclosure of the records. It is also clear that the application was conceived, moved and determined within a very short timescale in order to secure production of the records in a manner which would interfere with the inquiry's hearings and progress to the minimum degree. Interestingly, the trust raised no concerns about the issue of confidentiality or data protection (see para [24] of the judgment). It was content that such issues could be addressed by the procedures adopted by the inquiry, including measures such as redaction. The issue in the case was whether disclosure of the documents would represent an unlawful breach of the patients' article 8 rights.

[73] Having set out a range of principles which he drew from the authorities to which he had been referred, Gillen J observed at para [32] of his judgment that:

> "Although art 8 contains no explicit procedural requirement, the court will have regard to the decision-making process to determine whether it is to be conducted in a manner that is fair in all the circumstances."

[74] The judge then posed a series of questions as to what notice had been given to the patients and what steps had been taken to secure their views and protect their interests. Although Gillen J said that it was "important to appreciate that the requirement for this procedural fairness rests on the court", it seems to me that he was there talking about the obligation on the court to ensure that those affected were informed about the court proceedings, given that the application was for a declaration that was to be determinative of their rights, *not* that it was necessary for the inquiry to have informed the patients in advance of the provision to the trust of the notice to produce documents. That latter issue did not arise before him given how the chairman had determined to proceed. Gillen J went on to state that the "Inquiry in my view needs not only to take reasonable steps to identify and notify such patients concerned but also to satisfy the court that it has taken all practical steps within the context of the strong public interest in there being disclosure." As

above, that appears to me to be describing what was required of the inquiry in its capacity as the plaintiff in the proceedings before him.

[75] At para [33] of his judgment, Gillen J indicated that he was satisfied that disclosure of the patient records prima facie created a breach of their article 8 rights (i.e. that it would be an interference with those rights which required to be justified). That required the inquiry to be pursuing a legitimate aim and for the requirement to produce the records to be proportionate. As to the issue of legitimate aim, Gillen J was in no doubt that this requirement was satisfied. At para [34] he said:

> "There is a strong public interest in these records being produced for the purpose of this Inquiry into the death of children. Moreover it is hoped that this Inquiry will help restore public trust and confidence in the quality and standards of care provided by the Health and Social Services. I am satisfied that this case clearly falls within the ambit of art 8(2) of the Convention and is highly relevant to the issue of the protection of health."

[76] As to the proportionality of the requirement, the judge was influenced by the strong public interest in production (see paras [34]-[35]); the careful treatment which would be given to the documents once they had been received (see paras [36] and [39]); the fact that the chairman was acting within his legal powers (see para [37]); that all reasonable and practical efforts had been made to involve the patients if they wished to participate (see para [40]); and the need for the inquiry to proceed with expedition (see paras [35] and [40]). He was persuaded that it was necessary for the disclosure to be made and granted the declaration sought accordingly.

[77] A particularly pertinent passage for present purposes is what the judge said in para [35] of his judgment:

> "I respectfully agree with the views of Sales J as expressed in the *General Dental Council* case that where there is a very strong public interest in allowing disclosure of records, for example in the course of a General Dental Council investigation, art 8 cannot be taken in every case to impose an obligation to obtain an order before the order to produce such documents is made. This is particularly the case if it would impede the smooth running of an Inquiry and deplete its time and resources in a manner which could have a detrimental effect on its effectiveness. However, the sentiments expressed by Sales J were made in the context of a case where the General Dental Council (GDC) wished to establish that the registrar of the GDC, who already had copies of the relevant patient records in

> his possession, might pass those to the investigating committee of the GDC to enable that Committee to conduct an investigation into the allegation of professional misconduct of a particular doctor. In other words this was an internal disclosure. In a case such as the present, where one public body, namely the Inquiry, is seeking documentation from a wholly separate public body, namely the Trust, I believe that it is appropriate to make an application to the court as has occurred in this instance."

[78] This passage is interesting because it may be thought to support the submission of the Inquiry in the present case that there will be cases where it is unnecessary for a patient to be given notice of a requirement that their records be disclosed; and that this is particularly the case where the provision of such notice, and a right to participate, would impede the smooth work of the relevant inquiry and could hinder its effective and efficient conduct. This view was based on the *General Dental Council* case, which I consider in further detail below. On the other hand, Gillen J was inclined to confine such circumstances to a situation of internal sharing. Where, as here, one public body (such as an inquiry) was seeking documentation from a different public body (such as a trust) he considered it appropriate that an application was made to the court.

[79] There are a number of features which distinguish the *O'Hara* case from the present situation. First, as noted above, the chairman in that case was content to make an application to the court. The issue which arose before the Inquiry Chair in his PDR Ruling – whether such an application was in fact necessary – did not therefore fall for consideration. Nor therefore did the further question of whether, if an application to the court was unnecessary, the inquiry was required as a matter of legal obligation to put the patients whose records were sought on notice. That was certainly necessary when legal proceedings had been commenced which would be determinative of their rights; but that is a separate issue. Second, the powers of the inquiry were granted under different legislation (the Interpretation Act) and were in different terms. Third, the patients whose records were being sought were plainly not patients whose own treatment at the hands of the trust was being investigated. In that sense, they were strangers to the inquiry's investigation. When I turn to the question of an alleged substantive violation of article 8, it may also be relevant to note that Gillen J does not himself appear to have conducted a searching analysis of the content of the records and the extent of their relevance to the issues before the inquiry in the *O'Hara* case. He proceeded on an assessment of the strength of the public interest in disclosure in general terms.

The case-law relied upon by the Inquiry

[80] For its part, the Inquiry has relied in particular upon two Strasbourg cases: *Z v Finland* (1998) 25 EHRR 371 and *MS v Sweden* (1999) 28 EHRR 313. In *Z v Finland*, X

was discovered to be HIV-positive and was charged with several counts of attempted manslaughter. A question arose as to whether he had knowledge of his medical condition at the time of the sexual assaults in question. His wife, Z, invoked her right not to give evidence in relation to this. Orders were then issued obliging her medical advisers to give evidence and the police seized medical records concerning her. These records were added to the investigation file. Z complained that this was a breach of her article 8 rights. It was recognised that the applicant's doctors, including her psychiatrist, were required to testify as to matters of the utmost sensitivity concerning Z's health and intimate private life. However, the European Court of Human Rights (ECtHR) found that there had been no breach of article 8 either in requiring the applicant's medical advisers to give evidence or in her records being seized. It did find a violation in relation to the proposed making public, in due course, of court records disclosing her identity and her medical data.

[81] The ECtHR recognised that domestic law must afford appropriate safeguards to prevent communication or disclosure of personal health data as may be inconsistent with the guarantees in article 8. On the facts of the case, the authorities had been made aware of the applicant's views and interests; and her medical advisers had sought to protect her interests, notwithstanding that she had no right to participate in the court proceedings themselves. Taking note also of the fact that the applicant also had the opportunity to challenge the seizure of her records after the event, the court concluded that her views were sufficiently taken into account for the purposes of article 8 (see para 101 of the judgment). The first respondent relied upon this case as authority that article 8 rights do, in certain circumstances, permit a requirement of disclosure of medical notes or information without the patient's consent or involvement.

[82] In the *Stafford Crown Court* case, the court took the view that *Z v Finland* was a borderline decision on its own facts, which could not be used to support a general proposition either that a person whose article 8 rights are in issue need not be notified; or that representations by medical advisers alone are sufficient; or that oral representations are unnecessary (see para [34] of May LJ's judgment). I agree. It establishes no such general proposition. What it does demonstrate, however, is that the Strasbourg Court has recognised that there will be *some* contexts where these procedural rights are unnecessary in order to comply with the Convention. Indeed, that is how Lord Glennie viewed *Z v Finland* in his discussion of it at para [38] of his opinion in the *Scottish Ministers* case:

> "To my mind *Z v Finland* simply confirms that there will not inevitably be a breach of a complainer's art.8 rights if an order for recovery of her medical records is made without her having had the opportunity to be heard in opposition to it. There might be exceptional circumstances justifying that course. But it is not support for the proposition that giving the complainer (or other person whose rights may be affected by the disclosure of the

> medical records) a right to be heard is generally unnecessary."

[83] In other words, there will be cases where it may be Convention compliant for patient records to be disclosed without the relevant patient having been given an opportunity to participate in the disclosure process. That is consistent with what is said in the first part of para [35] of Gillen J's ruling in *O'Hara* (set out at para [77] above). The key question is whether an individual case falls within that exceptional category.

[84] In *MS v Sweden*, the ECtHR considered a claim that provision of the applicant's medical records by a clinic to a public authority which was assessing the applicant's claim for compensation for an alleged injury at work was in violation of article 8. The applicant argued that the effective protection of her rights under article 8 required that she should have been notified of the clinic's intention to communicate the data and afforded an opportunity to challenge that. Her case obviously chimes to some degree with that made by the applicant in the present case. The court accepted that her article 8 rights were engaged and that the provision of the documents amounted to an interference with those rights. However, it concluded that the disclosure of the documents without her involvement, and without any court sanction, was justified. It was influenced by the fact that there was a need to obtain objective information for the public authority to carry out its task and that the medical notes were such objective information; that the request was made in pursuance of a statutory function being exercised by a public authority; and that the request was from one public authority to another, in circumstances where the receiving authority was under a similar duty to treat the data as confidential (see paras 42-43 of the judgment). The Inquiry contends that its targeted request for documents to be made available only to it at this stage is analogous to the process found to be Convention-compliant by the ECtHR in the *MS* case. Again, I consider this to be authority that the Convention obligations are flexible enough to embrace cases where notice requires to be given, and other cases where it is not required to be given, depending upon the context.

The General Dental Council case

[85] I have found additional assistance in the judgment of Sales J in *Re General Dental Council's Application* [2011] EWHC 3011 (Admin). This case was referred to in Gillen J's judgment in the *O'Hara* case and discusses in some detail the *MS v Sweden* authority relied upon by the Inquiry. Albeit it was not opened by any of the parties in these proceedings, it is of relevance because it expressly addresses the disclosure of patient records between one public authority and another for investigative purposes.

[86] The case was an application by the General Dental Council (GDC) for a declaration that it may use and disclose the dental records of fourteen patients and former patients of a fifteenth interested party who was a registered dentist. The

GDC wished to be able to use the patient records for the purposes of professional disciplinary proceedings which had been commenced against the dentist. The GDC wished to establish that its registrar and those working in his office, who already had copies of the relevant patient records in their possession, those having been obtained from an insurance company (HSA), may pass those records to the Investigating Committee of the GDC. This was to enable that committee to conduct an investigation into allegations of professional misconduct and impairment of fitness to practise against the dentist, which had been referred to the Investigating Committee by the registrar. The plaintiff also sought a declaration that, if the Investigating Committee decided that the allegations ought to be referred to the Professional Conduct Committee for hearing and determination, it would be lawful for it, in turn, to pass the patient records to that committee so that full hearing could proceed.

[87] The major issue between the parties was whether the various organs of the GDC were entitled to pass the patient records on without the need of first applying to the court for its approval for them to proceed in that way. However, in his decision Sales J also addressed the legality of the initial provision of the documents by HSA to the GDC. The patients had refused consent to the use of their records for the GDC's purposes or had declined to respond. Sales J considered the relevant provisions of the Dentists Act 1984 which governed the functions and operation of the GDC. Of particular significance is section 33B(2) of the 1984 Act which provided the GDC with power, for the purpose of assisting it in carrying out its functions in respect of a person's fitness to practice, to "require any person… to … produce any document in his custody or under his control" which appeared to the GDC to be relevant to the discharge of those functions. Section 33B(3) provided that nothing in section 33B shall require or permit any disclosure of information which is prohibited by any relevant enactment; and section 33B(5) provided that a person shall not be required to produce any document under section 33B(2) which he could not be compelled to produce in civil proceedings before the High Court. The section 33B(2) and (5) provisions bear some similarities to sections 21(1)(b) and 22(1)(a) of the 2005 Act.

[88] Earlier, the GDC had used this power to require HSA to provide patient records to it. The dentist contended that the GDC had unlawfully obtained patient records in this manner, without having notified or involved the patients concerned. It was argued that the only proper and lawful course available to the GDC, if it wished to obtain and use patient records, was to seek the consent of the patient in question and, if consent was given, to arrange for the patient to require his dentist to hand over his dental records to the GDC; or, if consent was not given, to apply to the court for an order against the patient requiring him to hand over (or instruct his dentist to hand over) his dental records to the GDC. By not proceeding in this way and, instead, simply requiring a third party to produce the records, it was argued that the GDC could not show that its interference with the patients' article 8 rights was in accordance with the law. At para [34] of his judgment, Sales J held as follows:

> "I do not accept these submissions. In my view, section 33B(2) is entirely clear in its effect. It allows the GDC to impose a requirement on "*any* person (except the person in respect of whom the information or document is sought)" (emphasis added) to supply information or "*any* document in his custody or under his control which appears to the Council relevant to the discharge of those functions" (emphasis added). This provision plainly gave power to the GDC to require HSA to provide further information and patient records as it did. There is no restriction on the powers of the GDC as was suggested by [counsel for the dentist]."

[89] Once it was acknowledged that the power to compel the production of documents could be used to obtain patient records held by a third party, Sales J went on to hold that there was no basis for any suggestion that the GDC acted in breach of its obligations under article 8 in exercising its powers in relation to HSA in the case (see para [35] of the judgment). That dealt with the suggestion that the GDC had used the wrong procedure. However, in para [36], Sales J also concluded that reliance on section 33B(3) added nothing. That provision served an obvious purpose in making it clear that nothing that the GDC did in seeking to impose a requirement under section 33B could override any statutory prohibition against supplying information or documents which bound the person who had the documents "as distinct from being able to override, e.g., common law obligations of confidentiality." Rather than merely dealing with the internal transfer of records between different organs of the GDC, the case went further and endorsed the use of a power analogous to section 21 of the 2005 Act to obtain those records without consent in the first place.

[90] Sales J was untroubled by the argument that the GDC could not share the patient records between its various organs for the purpose of its statutory functions. Although, when the GDC received the records, they were subject to obligations of confidentiality in respect of them which arose by reason of the obviously private nature of the information in them and the manner in which and purpose for which they came into the GDC's hands, such common law obligations were qualified and were overridden by statutory provisions in the present context (see paras [40]-[41]). At para [48] he held as follows:

> "The fact that the patients in question object to the disclosure, or do not consent to it, does not affect this position. The reason that the GDC is given statutory authority to make use of patient records in this way is because the public interest in investigation of allegations against dentists and other medical practitioners of impairment of fitness to practise has been assessed by Parliament (and by the courts, under the common law) to be so strong as to override private interests of patients in

> preserving confidentiality, to the extent necessary for the investigation to take place. Where the GDC proposes to make use of patient records in this way, contrary to the wishes of the patients in question, then – so far as the common law regime is concerned – it will usually be a matter of good practice (albeit not a legal obligation) to inform the patients in advance about what the GDC proposes to do with their records, so that they have an opportunity to consider whether to make objections to that course and if need be apply to court to raise such objections (e.g. to say that disclosure of their records is not necessary for the purposes of the investigation to be carried out): compare *Woolgar v Chief Constable of Sussex Police* [2000] 1 WLR 25, 36H-37B per Kennedy LJ."

[91] That addressed the issue as a matter of common law rights and the statutory scheme. Sales J went on to note that, arguably, the position may be different having regard to the requirements of the Convention:

> "Arguably, when one turns to the public law/HRA regime, some attempt at getting in touch with the patients concerned to let them know that it is proposed that their records should be used for the purposes of professional misconduct proceedings may be a matter of obligation (absent circumstances which would make it impracticable or unduly harmful to the public interest to do so) to ensure that the interference with patients' Article 8 rights is "necessary in a democratic society" and kept within proportionate bounds: see paras. [63]-[65] below. In substance, the GDC has done that in the present case. I am also told that it is now their practice to do so in all cases."

[92] As foreshadowed in this passage, the judge returned to this issue later in his judgment. In fact, he considered that the Human Rights Act considerations were at the heart of the case (see paras [50] and [54]). At para [55], Sales J commented that, "The leading Strasbourg authority regarding one public authority transmitting confidential patient records to another public authority to enable the second authority to carry out functions in the public interest is *MS v Sweden*…" He went on to discuss and quote from *MS v Sweden*, which I have summarised above. Applying the principles evident in that case to the situation before him, he considered that there was no article 8 breach in the GDC sharing the patients' dental records between various of its organs (see para [57]). This pursued a legitimate aim. Indeed, there was a "strong public interest in the proper administration of professional disciplinary proceedings, particularly in the field of medicine" which had been emphasised by Thorpe LJ in *A Health Authority v X* [2001] EWCA Civ 2014; [2002] 2

All ER 780, at paras [19]-[20]. Sales J quoted with approval Thorpe LJ's observation that the effect of this is that the public interest in effective disciplinary procedures for the investigation and eradication of medical malpractice will "invariably" outweigh patient confidentiality "save in exceptional cases."

[93] Sales J also considered that the proposed disclosure was in accordance with law, since it was to be made pursuant to a clear statutory regime which provided a proper legal basis for the disclosure. He then concluded that the proposed disclosure was necessary and proportionate to the important public interest being promoted. It was to a limited category of people and subject to appropriate safeguards. (As with Gillen J in the *O'Hara* case, this conclusion was reached without detailed discussion of the nature of the records in each case or the particular allegations relating to each patient's treatment, much less by means of parsing the content of individual records.) Care would be taken to ensure that private information regarding the health of identified individuals would not be circulated more widely than was necessary, nor released unnecessarily into the public domain. In the judge's view, these features of the legal regime offered sufficient safeguards with respect to the protection of the patients' interests so that the case before him was covered by the judgment in *MS v Sweden*.

[94] In view of the strength of the public interest in allowing disclosure of the patient records for the investigative purposes, and the safeguards which were in place to ensure that the records were only used for that purpose, the case was closely similar to *MS v Sweden* and article 8 could not be taken to impose an obligation on the GDC to obtain an order of the court before arranging for the onward disclosure of the patient records to the additional committees. The judge was reinforced in this conclusion by the fact that requiring a court order to be sought in every case "would be expensive and would involve a needless depletion of its time and resources, which would in turn be likely to have a detrimental effect on the effectiveness with which and speed at which it can carry out its important investigatory functions in the public interest." The fair balance between the interests of the individual and the interests of the general community which is inherent in the Convention rights did not require that the GDC's functions should be subject to this impediment.

[95] Sales J further did not consider that authority relied upon by the dentist as indicating that judicial involvement was required in such an exercise supported that proposition (see para [62] of the judgment). On the contrary, he considered it had made clear that the intervention of the court was *not* required in a case where it was proposed to disclose or make use of patient records for the purposes of professional misconduct or improper practice proceedings by appropriate regulatory bodies.

[96] Having dispensed with the argument that a court order was required, at paras [63]-[65] Sales J went on to give some guidance for future cases, which, although obiter, is perhaps of most relevance to the present case, since he addressed the question of whether article 8 nonetheless required the GDC to give notice to those patients about what it was proposing to do with their records. He made only

tentative comments in relation to this, since he had not had the benefit of detailed argument. Moreover, this issue was addressed on the assumption that the GDC had already lawfully obtained the documents. The judge considered it arguable that the good practice indicated by Kennedy LJ in *Woolgar v Chief Constable of Sussex Police* [2000] 1 WLR 25 would be required under article 8. In *Woolgar* it was indicated that it is usually a matter of good practice (albeit not a legal obligation) to inform an individual in advance that it is proposed to disclose their confidential information (in that case, the contents of a police interview) to a professional or regulatory body, so that the individual has an opportunity to consider whether to make objections to that course and if need be apply to court to raise such objections. In the *Woolgar* case, the Court of Appeal considered the public interest in the sharing of such information to be so strong that it was proposed that the holder of the information (there, the police) could voluntarily provide it to a regulatory body. Against the argument that article 8 may require such notification, Sales J considered it significant that prior notification of disclosure was not said by the ECtHR to be necessary in either *MS v Sweden* or *Z v Finland.* On the other hand, he considered that there may be scope for development of the law in this area and for a greater focus on the safeguards for patients where confidential medical information about them is to be used for other purposes, particularly where such information may be the subject of intensive scrutiny by others.

[97] The judge noted that, in various contexts involving interference with individuals' article 8 rights, the ECtHR has held that procedural obligations may arise requiring the involvement of an individual in some way before a decision is taken to act to interfere with his rights under article 8(1). In the context of the case he was dealing with, it could be said (as Kennedy LJ observed in *Woolgar*) that taking steps to give patients notice that their records were to be used for professional or regulatory proceedings gave them an opportunity to make representations against the public authority making disclosure and to go to court if they felt strongly that disclosure ought not to be made. Sales J commented that, "It might be argued that this would be an additional safeguard for patients which could be effective, while at the same time being less intrusive and generally costly for a body such as the GDC than would be an obligation for it to apply to court itself in every case."

[98] Sales J's conclusion on this issue was set out in para [65]:

> "Even if adoption of such a procedure were now, by development of the law under Article 8, to be treated as a legal requirement, it would not in my opinion involve imposing greater burdens on the GDC than they have sought to discharge on the facts of the present case and which they would propose to discharge in future cases by giving such prior notification as a matter of general practice. I think that the obligation, if it exists, would be very much along the lines indicated by Kennedy LJ in *Woolgar*. The GDC would only have to take reasonable

> steps to identify and notify the patients concerned. It would not be obliged to do so if that was impracticable… or undesirable for some reason of the public interest. I do not think that any such possible obligation would have required the GDC in this case to take further steps to try to track down the four patients who did not reply to its letters seeking their consent. In situations where it is not possible to follow such a prior notification procedure, particular care may need to be taken to ensure that the other safeguards in place will be effective to ensure that confidential patient information is only disclosed or made use of for proper purposes."

[99] In summary, although Sales J considered that advance notification may arguably be a requirement under article 8, he did not conclude that it was presently such a requirement. Indeed, that would require to be a development of the law, as compared with the position in *Z v Finland* and *MS v Sweden*, in the context of the case with which he was dealing. Moreover, he appeared to envisage that any such requirement would not be absolute, yielding to practicability or other public interest considerations; and that the content of any such obligation would be modest, extending only to an obligation to inform the patient of the authority's intention and not a more elaborate procedure for participation. Where the patient wished to raise an issue, it would be for them to invoke some further legal procedure.

The practical consequences of the rights for which the applicant contends

[100] This draws one back to the question of whether, even if in principle an obligation of advance notification was a desirable procedural protection, its imposition as a matter of obligation would be unwarranted for other public interest reasons. The Inquiry relies on a variety of difficulties which, it asserts, would arise if the applicant is entitled to the participation rights for which he contends. I have already mentioned some of these above (see para [48]). They include the following issues:

(i) *There is uncertainty as to which confidential information may attract this protection.* First, there is the question of *which* confidential information or documents in the hands of a recipient of a section 21 notice would give rise to an obligation to notify and involve the person to whom that information related. In the *Stafford Crown Court* case, May LJ recognised candidly that potential difficulties were presented by the issue of where the line should be drawn as to when notice was required and when not (see the discussion at para [29] of the judgment). If a line is not clearly drawn by a published rule, who should decide whether a person is to be given notice? May LJ felt that the answer may have to be a judge; but it is difficult to prescribe how that would be done in the context of a public inquiry where there are no extant proceedings, other than by requiring an application to court in every instance where confidential

information was likely to fall within the ambit of the requirement to produce documents. The Inquiry has pointed out, even in the context of an inquiry such as it is undertaking, that similar issues of confidence might arise in respect of confidential staff documents (e.g. records of disciplinary investigations or whistleblowing processes). There will be myriad other instances, in other inquiries, where relevant documents containing confidential and sensitive information relating to individuals is held by a third party. This issue can be addressed provided medical records are treated as a uniquely protected category of documents; but I have concerns that that may not be an adequately principled distinction.

(ii) *The inquiry may not know that the document-provider holds confidential documents.* Relatedly, in many instances it would be difficult to know whether such notice ought to be given since the inquiry may not know in advance whether the recipient of the notice held information which had been provided to them or it in confidence. In circumstances where relevant documents or information *had* been provided in confidence, it may be impossible to know that in advance. Again, that may be unlikely to be the case in relation to formal medical notes and records (which are likely to be held by only a limited number of bodies in most cases); but private medical information, or for instance information about an individual's sex life or political or religious beliefs, may frequently be held by others.

(iii) *The notification might undermine the effectiveness of the inquiry.* There is also a concern that the requirement to inform an individual that their information is being sought by a public inquiry may 'tip them off' in circumstances which allows them to dispose of or delete evidence or to pressurise others (including the recipient of the section 21 notice) to do so. Although this is highly unlikely to arise in the present case, it is in my view a significant risk which weighs against a legal requirement of notification at the time or in the manner for which the applicant contends. In other cases, it may give rise to a real risk of undermining the purpose, effectiveness or investigative strategy of the inquiry. Consideration of the *Cabinet Office* judgment suggests that the Covid-19 Inquiry has made use of draft document requests (under rule 9 of the 2006 Rules). The Trust suggested that a similar approach could have been taken in this case. However, for that to be effective to meet the applicant's case, the draft notice would have to have been shared with a third party (whose information is liable to disclosure) and not, as in the case of the Covid-19 Inquiry, simply with the intended recipient of the notice.

(iv) *This will give rise to delay.* The participation rights for which the applicant contends will undoubtedly result in public inquiries being slowed down in their pursuit and receipt of relevant documents and information in cases where, having been notified of an intention to seek documents relating to them, individuals in the position of the applicant seek to object to the inquiry receiving some or all of those documents. If the inquiry needed to deal with

representations, and perhaps convene hearings to do so, this would inevitably give rise to some delay.

(v) *It will give rise to additional costs.* Additionally, this is likely to give rise to increased costs, particularly if, as the applicant asserts, an individual in his position, whose confidential information is sought by an inquiry, is entitled to legal advice and representation at public expense (if necessary) in order to properly engage with the request for his documents. Mr Lavery accepted in the course of his submissions that, if they were correct, an individual whose medical information was within material which was the subject of a section 21 notice may have to be provided with legal representation, at the Inquiry's expense, in order to take advice on the proposed requirement to produce the documents and make representations on their behalf. As it happens, the applicant and notice parties in this case are publicly funded core participants before the Inquiry; but in other cases, this will not be so.

(vi) *There are practical difficulties in facilitating meaningful representations.* There was something of a catch-22 scenario identified in exchanges with Mr Lavery during the course of his submissions about how, practically, the Inquiry would go about facilitating the type of procedure for which the applicant contends. It was accepted that, in order for the patient (or their relative) to meaningfully participate in the debate about which records the Inquiry should request and receive, the patient would themselves have to have a copy of their records. It is possible for the patient to obtain those records themselves in certain circumstances, although I was told this is much less straightforward than one might assume, particularly where the patient lacks capacity (in which case recourse to the High Court is required). Mr Lavery suggested that the Inquiry could obtain the full records, on a *de bene esse* basis, and provide them to the patient for the purpose of the patient then making representations about which records the Inquiry should seek and obtain. By that stage, however, the Inquiry would have received all of the records; and a level of disclosure which the patient might then argue was excessive would be a *fait accompli*. Moreover, this type of procedure would inevitably add additional time and cost to the exercise. In the alternative, an individual could simply make representations before the Inquiry had seen any of the relevant documents. However, in those circumstances, it may be difficult for the representations to be informed or meaningful and, insofar as they were abstract observations about the terms of the Inquiry's intended notice, that is classically a matter for the inquiry itself to determine.

[101] As a result of the issues highlighted above, taken both individually and in combination, the Inquiry submits that a requirement to give prior notification to those who are the subject of requests for documents before making such requests – which are permissibly wide – would be inconsistent with the breadth of a public inquiry's statutory power and would create an unworkable administrative burden on any inquiry tasked with investigating matters of public health. It submits that the

process called for by the applicant would inhibit all public inquiries in the field of health, adding significantly to the costs of such inquiries and giving rise to inevitable delay. It also submits that, aside from the sheer volume of the administrative task required, the process would be complicated, lengthy and would give rise to a host of litigable issues. For instance, would the Inquiry have to undertake a capacity assessment for each patient? Would other parties have to be given a right to be heard in opposition to a patient's representations? The Inquiry also points to the statutory duty upon the Chair to have regard to the need to avoid any unnecessary cost when making decisions as to the conduct of the Inquiry (see section 17(3)). In its submission, these issues point to the conclusion that if any such duty is to be introduced, it should be done by Parliament and not by the courts.

[102] NP2 has argued that the approach for which he contends is simple and not onerous. However, it would involve core participants being notified of PDRs and, notably, informed "of the exact nature of the request and the reasons for it"; then affording such participants an opportunity to consider the request with legal advice and then an opportunity to be heard on the issue. In my judgment, that is likely to give rise to many, if not all, of the issues highlighted above.

The prejudice to the applicant and notice parties

[103] It is also necessary to assess the prejudice which will or may be caused to the applicant and notice parties in the event that the Inquiry is permitted to follow the procedure which it has adopted. I do not underestimate the objection in principle to a patient's medical records being disclosed without their consent or involvement. However, in the context of procedural fairness, it is also relevant to consider the extent to which this disadvantages an individual in terms of the procedural steps or representations they may wish to take.

[104] Where – as is principally the case in these proceedings – the individual's objection is that the Inquiry proposes to receive *too few* documents or records, I consider that the prejudice to that individual is minimal. First, the concern about the Inquiry receiving private information which it should not have does not arise. Second, it is quite open to a patient (or their relative), particularly where they are legally represented in the Inquiry, to make the case that more documents ought to be sought and obtained by the Inquiry. The Inquiry has made clear that it will keep this matter under review. It seems to me that it could not simply ignore representations on behalf of the applicant or notice parties that it should pursue additional documents. However, that is a case that they are each free to make without requiring the full participation rights for which the applicant contends. It is right that, to some degree, it is difficult to make such representations until one knows which documents the Inquiry has obtained in relation to you. However, that should be capable of being ascertained through a subject access request; and, if the argument is that the Inquiry should simply obtain *all* of the records relating to you, that argument can be made in the abstract in any event.

[105] Moreover, it is also open to the patient (or their relative) to obtain the patient's own records and forward relevant excerpts to the Inquiry. I was told on behalf of NP2 that most members of the AFM group have now obtained their own (or, as the case may be, their loved one's) medical notes and records. NP3 also made a submission to the effect that if a patient or relative core participant was privy to the nature of the information sought in relation to them in a PDR they could, having obtained their own records from the Trust, make a request to the Inquiry that it consider further relevant documentation. Mr Lavery told me that the applicant also now has the records for her son. There is nothing to stop affected patients bringing to the Inquiry's attention additional matters or documents where they wish to do so. Indeed, the first respondent's evidence is that, in the course of her evidence which has already been given to the Inquiry, the applicant's mother provided it with some medical notes and records which were in her possession pertaining to her son's time as a patient at Muckamore. The facility exists for patients to themselves provide the Inquiry with extracts of the notes and records and submissions as to why they are relevant or require further consideration. The extent to which the Inquiry takes up these suggestions is, of course, a matter for it.

[106] There is more likely to be some prejudice which arises where the nature of the concern – which is not principally what has been raised in this case – is that the Inquiry has received or will receive records which it should never see (either because the request is excessive or targeted at records which are irrelevant). In the applicant's case, his mother has averred that there are aspects of her son's life which are very troubled and upsetting, both prior to and during his time in Muckamore. A number of incidents in which he has been involved in some way are said to be of a very serious and sensitive nature, including incidents which may be criminal in nature and where the applicant was not merely in the position of victim. The applicant therefore raises the spectre of the Inquiry receiving documents in relation to him which it should not receive.

[107] This is more of a concern but must be considered in the context of the following factors. First, as the discussion above indicates (see paras [42]-[43]), it is in the nature of public inquiries that they are likely receive some documentation in the course of their investigative phase which subsequently transpires to be irrelevant or go beyond what is necessary. However, that does not mean that it is unlawful for the inquiry to seek a broad category of documents. It is primarily for the inquiry itself to determine what is or is not relevant, provided it has not gone off on a frolic of its own. Second, when a public inquiry receives documents, there will be a variety of safeguards in terms of how they will be held and disseminated (if they are disseminated at all). Third, when it transpires that documents have been received which turn out to be irrelevant or to go well beyond what is necessary for the inquiry's purposes, these should be returned or destroyed, either as a matter of fairness or under data protection requirements. Fourth, if an individual were permitted to argue that documents relating to him were irrelevant and should not be obtained, in principle it would have to be open to others to mount a counter-argument. (Taking an example from the present case, if the applicant was alleged to

have abused another patient and contended that the records relating to this were irrelevant, would that other patient not be entitled to make representations to the effect that it was necessary for the Inquiry to obtain those documents in relation to the alleged abuse of him, for instance if it was alleged that the hospital staff did too little to protect him from such abuse?) These issues would be difficult to assess without all parties having seen the relevant records.

[108] As to the third of the above points, I have already referred to the Inquiry's Privacy Notice. In addition, the approach adopted by the Covid-19 Inquiry was that, once documents had been received (in response to wide-ranging section 21 requests), the inquiry itself would review the documents to determine relevance. Any document identified as relevant would be disclosed to core participants, subject to redactions which would be applied by the inquiry but subject to a facility on the part of the material provider to request additional redactions (see the Covid-19 Inquiry's Protocol on the Redaction of Documents, quoted at para [12] of the judgment). The Divisional Court made clear (see para [69]) that, where a document was provided to the inquiry which turned out to be irrelevant, then the chair would not be entitled to retain that document. It should be returned (or destroyed). Not only would it be a waste of time and resources to retain irrelevant material but, in the Divisional Court's view, it would not be "fair to a person for the inquiry to retain a document which does not relate to a matter in question at the inquiry" with this being "particularly so if the document contains sensitive personal information": see paras [69] and [74]-[75] of that judgment. I wholly endorse that view.

[109] For these reasons, I do not consider there to be significant prejudice to the applicant arising from the concern that too many notes or records may be obtained by the Inquiry in this case. A separate issue may arise where a patient is entirely unaware that an inquiry has obtained their notes and records and I return to this issue below (see paras [122]-[124]).

[110] One of the key issues in this case is, in my view, the feeling on the part of the applicant and notice parties that they are being "excluded" from a process which centrally involves them. I can quite understand this feeling, in light of how the Inquiry has determined to proceed in relation to PDRs. However, the desire to be involved in all aspects of the Inquiry's investigation of their treatment is not in my view an adequate reason to conclude that fairness requires the type of participation rights for which the applicant contends. A public inquiry must be given a broad discretion to determine its own procedures and set its own course. Mr Sayers submitted that the Inquiry was patient-focused; but was not, and should not be, patient-led. A submission made on behalf of one of the notice parties that they were being "silenced" is not, in my view, a helpful or accurate characterisation. As I have explained above, the applicant and notice parties, particularly in light of their status as core participants, are able to engage with the Inquiry, including being free to make a range of submissions to the Inquiry on the issue of what records should be sought, obtained or considered. There may be some force in the submissions made by the applicant and notice parties that they would in fact be able to assist the Inquiry by

directing it to relevant parts of their records; but it was not irrational for the Inquiry to conclude that it would primarily do this by way of hearing evidence of patient experience first and then seeking records in an incremental manner.

The role of the courts

[111] It is, of course, an unobjectionable element of the High Court's supervisory jurisdiction that it should have, and exercise, power to restrain the chair of a public inquiry from acting in a way which is unlawful or ultra vires. However, the cases are replete with warnings that inquiries should be permitted considerable leeway, and a degree of deference, in their task, particularly given that the members of an inquiry panel will have a much greater understanding of their task than the courts: see, for instance, Lord Woolf at para [31] of *R (A) v Lord Saville (No 1)* [2000] 1 WLR 1855; and, to similar effect, Gillen LJ at para [31] of *Re LP's Application* [2014] NICA 67.

[112] It was also not in dispute that, in a procedural fairness challenge, the court must determine for itself whether or not a fair procedure was followed. It is not a question of whether the decision-maker has acted reasonably. However, as Gillen LJ recognised in *Re LP's Application* (*supra*), the court will give great weight to the tribunal's own view of what is fair and will not lightly decide that a tribunal has adopted a procedure which is unfair. He went on to say (at para [34]):

> "The principle of fairness must inform their task but it does not follow that fairness requires the same level of public or personal disclosure at every point of the inquiry. What fairness requires may vary according to the particular task or stage that the inquiry has reached."

Conclusion on the procedural fairness issue

[113] In summary, I accept the first respondent's submission that to require a process such as that contended for by the applicant and notice parties would be inconsistent with the broader statutory scheme that governs the Inquiry's procedures. I do not consider that it is required by the duty to act in a procedurally fair manner in the context of this case.

[114] It seems to me a highly problematic proposition that a public inquiry established by law with the purpose and duty of investigating a matter of significant public controversy should be hampered in its obtaining of documents and evidence from party A because that documentation may contain information (of a confidential or arguably confidential nature) relating to individual B. The obtaining of medical records from a public authority in response to a request which is focused on the disclosure of records in respect of an identified individual is perhaps an extreme example of where this issue may arise. Nonetheless, as a matter of principle, it is merely an example of where a disclosure requirement is imposed upon a holder of relevant information which relates to a third party.

[115] Public inquiries are provided with a range of investigative powers in order to permit them to conduct a searching and thorough investigation within their terms of reference. Their nature as inquisitorial bodies which are generally masters of their own procedure provides crucial background context to the analysis in the present case. It is for this reason that an analogy with disclosure processes in the adversarial criminal law context is inapposite in my view. In the *Cabinet Office* case, it was common ground that the analogy with court proceedings – there, civil proceedings – could only be a loose one (see para [66]). That was because there were different rules applying to litigation in court and such litigation had a different aim from that of a public inquiry.

[116] The applicant relied upon the statement in *Beer on Public Inquiries* (1st edition, 2011, Oxford), at para 5.63, to the effect that disclosure of medical notes normally requires the patient's consent, a court order, or the existence of an overriding public interest in the disclosure of the notes and records. The section 21 notice is, however, equivalent to a court order in this context. It imposes a legal obligation which must be complied with, absent a successful section 22(4) claim or application for judicial review. Albeit an inquiry chair cannot himself or herself imprison or fine for contempt, once a section 21 notice has been served, failure to comply with it without reasonable excuse is an offence (under section 35). In the *Cabinet Office* case, the court observed that (notwithstanding that they are governed by different statutory provisions) there are "some parallels between public inquiries and the role of a Coroner" (see para [54]). For my part, I find this analogy instructive. A public inquiry – absent any suggestion of improper purpose, bad faith or irrationality – is not to be viewed as a partisan actor but rather, much like a coroner, as an independent investigator which is entitled and required to follow the evidence as they see fit, including by the gathering in of potentially relevant material. Put another way, Parliament has struck a balance which allows public inquiries properly investigating matters of significant public concern to abrogate obligations of confidentiality because of the overriding public interest in such inquiries being able to carry out their work.

[117] In view of the statutory context and the practical considerations discussed above, I conclude that fairness did not require the applicant to be given the various procedural rights which he seeks in these proceedings before the Inquiry served a PDR on the Trust requiring provision of medical notes and records relating to him. His rights are adequately protected by the safeguards relating to the Inquiry's holding and use of the records, and his opportunity to engage with or challenge the Inquiry, after the relevant records have been received.

[118] I recognise that, in reaching this view, I am departing to some degree from the view expressed by Gillen J in the second part of para [35] of his judgment in *O'Hara*. I do not consider that a bar to the conclusion I have reached for a number of reasons. First, Gillen J merely expressed it to be "appropriate" for a court order to be sought in circumstances such as the present. He did not state that it was legally required for

that to occur. Second, that issue was not, in fact, an issue which he was required to determine, given that the trust and inquiry in that case had both decided that it would be best to make an application to the court. Any view Gillen J expressed on the issue was therefore *obiter*. Third, the same issue is not, in fact, before me. The Trust has not sought judicial review of the Chair's PDR Ruling to the effect that no application to the court was necessary. The question before me is a different question, namely what advance notice (if any) a patient must have of a section 21 notice being issued which may require confidential patient notes relating to them being disclosed or of that notice being complied with. The statutory scheme does not require any such notice, much less the additional rights for which the applicant contends, and, for the reasons I have given above, I do not consider that it is necessary or appropriate to imply such an obligation into the scheme as a matter of fairness at common law or under section 17(3) of the 2005 Act.

Article 8 ECHR

[119] There was no dispute between the parties that the disclosure of a patient's medical notes and records engages issues of privacy; nor that article 8 of the Convention provides a high degree of protection to this aspect of an individual's private life. The applicant contended that, in requiring disclosure from the Trust of his notes and records without any participation by him or on his behalf, the Inquiry had violated his article 8 rights in both its procedural and substantive dimensions.

[120] As to the procedural limb of this challenge, the Inquiry submits that the procedural protections afforded by article 8 are no greater than those required under the common law. In this regard, it relies upon *R (Citizens UK) v Secretary of State for the Home Department* [2018] 4 WLR 123; [2018] EWCA Civ 1812, at para [103]. In that case, Singh LJ did not wish to lengthen his judgment by addressing the procedural requirements which might arise under article 8 since they could not give greater rights than the common law would in that context. This will, of course, be context specific; and it is worth noting that Singh LJ made that comment having determined that the requirements of common law fairness had been breached, rather than complied with.

[121] Where a court is assessing the procedural protection afforded under article 8, the Strasbourg jurisprudence indicates, as with the common law, that the process should be considered "as a whole" (see, for instance, *Lazoriva v Ukraine* (App No 6878/14) at para 63). For the reasons given above in relation to common law fairness, I do not consider that a person in the position of the applicant requires to have the opportunity of participating in the Inquiry's deliberations before it serves a section 21 notice or before it is complied with. Looking at the procedure as a whole, the public interest being pursued by the Inquiry's PDRs, taken together with the safeguards provided at later stages of the inquiry process, is such that there is in my view no requirement for the sophisticated procedural rights for which the applicant contends.

[122] I have nonetheless been troubled by the suggestion that it would be possible for a public inquiry to obtain patient notes and records without any indication whatever being given to that individual at any point that those notes and records had been obtained. As discussed above, a patient has a reasonable degree of protection when their confidential information comes into the hands of a public inquiry. They can expect that the information will be dealt with sensitively and proportionately; that it will be returned or deleted if and when it is no longer necessary for it to be held; and that their rights under data protection legislation will be protected. They also have a right to be treated fairly by the inquiry if and when their confidential information is liable to be deployed in a way which would disclose it to the public. At that point, I would have little difficulty in holding that as a matter of fairness a public inquiry must engage with a patient whose interests may be affected in that way. However, in advance of that arising, it would be difficult for such a person to engage with an inquiry in relation to these matters, or to exercise their rights under the data protection legislation, if they have no idea whatsoever that their notes and records have been accessed by the inquiry.

[123] To that end, I would be prepared to hold, as contemplated by Sales J in the *General Dental Council* case, that there is an obligation – arising under article 8 of the Convention – that a public inquiry which so obtains medical records must inform the patient that it has done so. For the reasons given above, I do not consider this necessary *in advance* of the records being received, since that would unduly interfere with the inquiry's investigative processes. However, some indication should be given to the patient that the confidentiality of their records has been overridden by the exercise of the inquiry's statutory powers. This should be done as soon as practicable, which in most cases will be as soon as the records are received, unless there is some particular reason why this step would, in the circumstances, undermine the inquiry's investigation if notification occurred at that time.

[124] In reaching this view, I proceed on the basis that the protection of the privacy of medical records has a special significance in the context of article 8. I do not purport to set out any more general rule other than for medical notes and records. Although, broadly, I consider Parliament in the 2005 Act to have overridden any more detailed procedural requirements in this context before the inquiry has seen the documents it considers it requires, it seems to me that the rights in question also require some indication to be given to a patient that their records have been obtained. It will then be a matter for them how, if at all, they wish to engage further with the inquiry or to challenge it.

[125] As to the substantive limb of article 8, the applicant contends that the Inquiry has not demonstrated the appropriate balancing exercise having been carried out which (he submits) was required in order for a proper decision to be taken on the level of disclosure to be required. He contends that the Inquiry could not properly carry out the necessary balancing exercise between the different interests: the aims of the Inquiry on the one hand and, on the other, his private interests and the general public interest in maintaining patient confidentiality.

[126] For similar reasons as are discussed in the consideration of procedural fairness above, I consider that public inquiries have been given a special place in the machinery of the state to respond to issues of significant public concern such that, provided that an inquiry does not go beyond its proper remit by going off on a frolic of its own and that it is seeking documents which are prima facie relevant to its terms of reference, the interference with privacy rights which the exercise of its powers entails will be proportionate to the legitimate aims being pursued. As Sales J indicated in the *General Dental Council* case (see para [90] above), Parliament has already struck a balance in favour of public inquiries being able to access such information to the extent necessary to facilitate their investigations (which, in the first instance, is for the inquiry itself to assess).

[127] In the event that a more searching analysis is necessary of the proportionality of the disclosure which the Inquiry has required, I would still find that its actions were proportionate in this instance. There is a certain artificiality about this aspect of the applicant's case, in circumstances where the broad thrust of his mother's concern is that the Inquiry will seek far too little disclosure of his records than she considers is warranted. In the event, as noted above, the PDR in relation to the applicant was disclosed in the course of these proceedings and I have therefore been able to consider it. It requires only very limited disclosure of certain parts of the applicant's records at this stage.

[128] The Trust's submissions make clear that it "considers it highly likely that the specific balancing exercise conducted by a court will weigh in favour of disclosing the patient material sought by a public inquiry", without prejudice to its position that this determination should only be reached after patient involvement. It has also made clear that it (the Trust) *wants* the Inquiry to receive the patient material it has requested. Indeed, the Trust's evidence makes clear that its preferred approach has been that the Inquiry should be provided with the entirety of the records which related to relevant patients' time at Muckamore. The Inquiry relies upon the statements to the effect that the applicant's mother is not opposed to disclosure of his records to it. It also points out that, significantly, no party has sought to argue that the documents being sought by the Inquiry are irrelevant to its Terms of Reference. The applicant's mother's concern is that relevant and important material may be missed or overlooked. This approach is shared by the other notice parties. In submissions on NP1's behalf it was emphasised that she wants the Inquiry to have as much information as possible. NP2 has expressly aligned himself with AFM's desire that *all* notes and records be obtained. NP3 has expressly averred that she is keen that any material that the Inquiry has requested is disclosed; and that she wishes to do all that she can to ensure that the Inquiry is in a position to properly investigate all matters in respect of Muckamore.

[129] Although – perhaps understandably, given how public inquiries operate – I have been provided with little or no information about the internal deliberations within the Inquiry which grounded the decision to request only those records in

relation to the applicant which are the subject of the PDR, case-law has firmly established that the question of whether or not a substantive breach of the Convention has occurred is a matter for the court and is not generally illuminated, and is certainly not dependent upon, the taking into consideration of the relevant Convention rights as part of public authority's reasoning process: see *Re Miss Behavin' Limited* [2007] 1 WLR 1420, *per* Baroness Hale at para [31] and Lord Mance at para [44]. It is in any event clear from the Chair's PDR Ruling that he had considered whether the notice at issue in the Trust's application was compliant with article 8 and that he was satisfied that it was a proportionate and lawful request.

[130] Given the breadth of the Terms of Reference of the Inquiry and the content of the applicant's affidavit evidence in these proceedings, it seems to me that the Inquiry would have been perfectly justified had it wished to obtain all of the applicant's notes and records relating to his time at Muckamore. This seems to be his mother's favoured approach. In view of that, the suggestion that it was a disproportionate infringement of his privacy rights to request the limited category of documentation which the Inquiry has requested by means of the PDR simply does not get off the ground.

[131] Sales J in the *General Dental Council* case and Gillen J in the *O'Hara* case were able to conclude, without detailed analysis of the relevant records, that the legitimate aim being pursued by the investigation in each case justified the disclosure sought. I note that, in the *Lewis* case concerning the Redfern Inquiry into human tissue analysis in UK nuclear facilities (*Lewis v Secretary of State for Health* [2008] EWHC 2196 (QB)), Foskett J had "not the slightest doubt" that that was an appropriate case in which to hold that the public interest justified disclosure. I hold a similar view in this case.

Conclusion

[132] My conclusions above should not be taken as a whole-hearted endorsement of all that the Inquiry has done. As the discussion in the *General Dental Council* case illustrates, it might well be said to be good practice to keep those whose records are being sought informed of what is happening. The Inquiry's prohibition on the Trust sharing with the relevant patients or their relatives that a PDR had been made concerning them might be thought to have been unduly strict. In circumstances where there was limited if any risk of documentary evidence being destroyed in the event that a requirement to produce it was made known, it is difficult to see what serious harm may have arisen from some more openness about the process. However, it is not the court's role to dictate such matters to the Inquiry Chairman. Nor is it the court's role to provide advice, much less direction, as to how the Inquiry might go about its work more effectively.

[133] On that note, I am concerned that at least part of the impetus for this challenge is ongoing disquiet on the part of the applicant and notice parties about the Inquiry's targeted approach to requesting patient records, which was made clear at the outset of its public hearings in June 2022. It is clear from a variety of evidence and

submissions in the case that several parties remain unhappy with the Inquiry's methodology in this regard and consider that there were, or are, better ways of proceeding. But that is not a matter which is the subject of this challenge. In his opening remarks in June 2022, the Chair made clear that he had attractions to various different courses which had been urged upon him. The broad reasons for his proposed approach were explained, including that the Chair was concerned about becoming overwhelmed with paperwork (in circumstances where the Trust had informed the Inquiry that one 'sample' set of patient records could run to some 20,000 pages); and that significant delay may impede the investigation or inquiry, or indeed impede change at Muckamore itself which was necessary in patient interests. These were matters within the Chair's discretion.

[134] Focussing on the proper subject matter of these proceedings, I do not consider that fairness required the applicant to have notice of the PDR relating to his records or to have the opportunity to make representations to the Inquiry in relation to this; nor did article 8 of the Convention. I do not consider the limited disclosure sought to represent a substantive breach of the applicant's article 8 rights. The limit of what article 8 requires in circumstances such as these is that a patient whose medical notes and records are obtained by a public inquiry is informed of that as soon as practicable after the records have been received. In this way, no person will be ignorant of such a disclosure having been made. Article 8 does not, however, require any more sophisticated interference with a public inquiry's evidence-gathering processes. That is at least the case in a context such as the present, where the Inquiry has itself been established as a specialist health-focused inquiry to investigate wrongdoing in a healthcare setting and is seeking the notes of patients who may have been abused. Whether a different analysis is required in other circumstances may have to be determined on a case-by-case basis.

[135] Since the Inquiry has not yet received the applicant's records on foot of the PDR it has provided to the Trust, the limited notification requirement I have identified above has not yet been triggered and a fortiori has not yet been breached.

[136] In view of the foregoing, I grant the applicant leave to apply for judicial review in respect of both of his central grounds of challenge, namely procedural unfairness and alleged breach of article 8 ECHR. However, I have not found either of these grounds to be made out and dismiss the substantive application accordingly.

[137] Absent any appeal and a successful application for a stay on the dismissal of the proceedings, I would expect arrangements to now be made for the Inquiry's PDRs to be complied with as soon as possible.

[138] I will hear the parties on the issue of costs but provisionally consider that the usual orders should follow as between the applicant and first respondent; and that the second respondent and notice parties should each bear their own costs.